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# Alternative Career Resolution: An Essay on the Removal of Federal Judges\*

BY STEPHEN B. BURBANK\*\*

## INTRODUCTION

This is a critical time for the federal judiciary and hence for all of us. For the first time in fifty years, the House has impeached, and the Senate has removed a federal judge, Harry Claiborne.<sup>1</sup> A subcommittee of the House Judiciary Committee

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<sup>1</sup> United States District Judge Harry Claiborne was impeached by the House of Representatives on July 22, 1986, 132 CONG. REC. H4710-21 (daily ed. July 22, 1986), and removed from office by the Senate on October 9, 1986. 132 CONG. REC. S15,759-62 (daily ed. Oct. 9, 1986). The last previous impeachment of a federal judge, or any other person holding federal office, was that of United States District Judge Halsted Ritter in 1936. 80 CONG. REC. 3066-92 (1936). Ritter was removed from office in the same year. 80 CONG. REC. 5602-08 (1936).

According to the Constitution:

The House of Representatives shall . . . have the sole Power of Impeachment.

U.S. CONST. art. I, § 2, cl. 5.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and

is presently investigating a second federal judge, Alcee Hastings, whose impeachment is called for by a resolution introduced last year.<sup>2</sup> A third federal judge, Walter Nixon, whose criminal conviction was affirmed on appeal,<sup>3</sup> has followed Claiborne's example by refusing to resign, and a resolution calling for his impeachment was recently referred to another subcommittee.<sup>4</sup>

There has been a flurry of legislative activity in response to these developments. Startled by the need to use the impeachment process against Judge Claiborne, a convicted felon who had exhausted appeals, and before that process had been completed, legislators in the House and Senate introduced resolutions proposing constitutional amendments that would make removal automatic in such cases.<sup>5</sup> When the process had run its course and in contemplation of a more difficult case, another senator proposed a broader constitutional amendment.<sup>6</sup>

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Punishment, according to Law.

*Id.* at § 3, cl. 6-7.

The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

*Id.* at art. II, § 4.

<sup>2</sup> See H.R. Res. 128, 100th Cong., 1st Sess. (1987) (resolution impeaching United States District Judge Alcee Hastings); 133 CONG. REC. H1506, 1514 (daily ed. Mar. 23, 1987).

<sup>3</sup> See *United States v. Nixon*, 827 F.2d 1019 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 749 (1988).

<sup>4</sup> The day after the Supreme Court denied review of his conviction for perjury, see *supra* note 3, Judge Walter Nixon announced that he would not resign. See Rodino Announces Impeachment Inquiry (March 17, 1988) (news release) (copy available from author). A resolution impeaching him was introduced on March 17, 1988, H.R. Res. 407, 100th Cong., 2d Sess. (1988), and it was referred to the Subcommittee on Civil and Constitutional Rights. See Rodino Announces Impeachment Inquiry, *supra*.

<sup>5</sup> See H.R.J. Res. 658, 99th Cong., 2d Sess. (1986); H.R.J. Res. 665, 99th Cong., 2d Sess. (1986); S.J. Res. 364, 99th Cong., 2d Sess. (1986); S.J. Res. 370, 99th Cong., 2d Sess. (1986). For an analysis of the Senate resolutions, see *Hearing on S.J. Res. 364 & S.J. Res. 370 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 30-39 (1986) [hereinafter *Hearing on S.J. Res. 364 & S.J. Res. 370*] (statement of Stephen B. Burbank). Cf. H.R.J. Res. 680, 99th Cong., 2d Sess. (1986) (proposing constitutional amendment empowering Congress to provide by law for diminution of salary of federal judge convicted of felony).

<sup>6</sup> See S.J. Res. 113, 100th Cong., 1st Sess. (1987). S.J. Res. 370, *supra* note 5, introduced by Senator DeConcini in 1986, included a broader proposal as well as a proposal for automatic forfeiture of office upon conviction of a felony and exhaustion of direct appeals. See *infra* note 9; see also H.R.J. Res. 364, 100th Cong., 2d Sess. (1988).

At the same time that federal judges were involved in criminal proceedings, and when impeachment proceedings were in prospect, legislators were considering experience under 1980 legislation that, for the first time, provided a statutory supplement to the arrangements prescribed by the Constitution.<sup>7</sup> Although that consideration included oversight hearings intended to be helpful to the judges in meeting their responsibilities under this legislation,<sup>8</sup> it also included a proposal to scrap the 1980 scheme in favor of a constitutional blank check to Congress because of the alleged “inactivity” of the judges.<sup>9</sup>

This is hardly the first time that the means devised by the framers to preserve the independence of federal judges have been at risk. Thomas Jefferson, at one time an advocate of judicial independence,<sup>10</sup> came to view the question differently and apparently hoped to use the impeachment process to remove federalist justices from the Supreme Court. His plan came a cropper with the Senate’s failure to convict Justice Samuel Chase.<sup>11</sup> The independence of federal judges was again under attack early in this century. The recall of judges was as dear to

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<sup>7</sup> Pub. L. No. 96-458, 94 Stat. 2035 (1980) (effective Oct. 1, 1981). The Act’s disciplinary procedures are contained *id.* at § 3, 94 Stat. 2035, 2036-40 (codified at 28 U.S.C. § 372(c) (1982)). See generally Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982-83).

<sup>8</sup> See *Oversight Hearing on Federal Judicial Branch Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) [hereinafter *Oversight Hearing*].

<sup>9</sup> 132 CONG. REC. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini). Senator DeConcini’s remarks were made in connection with S.J. Res. 370, *supra* note 5, which included the following proposed constitutional amendment:

The Congress shall have the power by appropriate legislation to set standards and guidelines by which the Supreme Court may discipline judges appointed pursuant to Article III who bring disrepute on the Federal Courts or the administration of justice by the courts. Such discipline may include removal from office and diminution of compensation.

<sup>10</sup> See, e.g., G. HASKINS & H. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, at 205-45 (1981); Stevens, *Reflections on the Removal of Sitting Judges*, 13 STETSON L. REV. 215, 218-19 (1983-84).

<sup>11</sup> See, e.g., P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 181-90, 228-55 (1984); Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase*, 48 J. AM. JUDICATURE SOC’Y 183 (1964-65); Stevens, *supra* note 10, at 218-20; Swindler, *High Court of Congress: Impeachment Trials, 1797-1936*, 60 A.B.A. J. 420, 421-24 (1974).

Theodore Roosevelt as it was repellent to William Howard Taft.<sup>12</sup> At least one scholar has viewed the removal of Judge Archbald in 1913 as in part a response to the recall movement.<sup>13</sup> Finally, although this is hardly an exhaustive account, we may remember "Impeach Earl Warren" billboards.<sup>14</sup> We may not remember, however, that Justice Douglas was put to considerable trouble in averting impeachment in 1970.<sup>15</sup>

Nor is this the first time that unhappiness with the constitutional arrangements for removal of federal judges has led to congressional advocacy of alternatives. On the contrary, constitutional amendments have been proposed in Congress since early in our history.<sup>16</sup> In the aftermath of the removal of Judge Halsted Ritter in 1936,<sup>17</sup> serious attention was given to statutory proposals that included and foundered on provisions authorizing removal by alternative means.<sup>18</sup> Similar proposals were revived in response to publicity surrounding a few federal judges in the 1960s, and, in a public well poisoned by Watergate, such proposals became a major item on the congressional agenda in the mid-1970s.<sup>19</sup> For present purposes, the remarkable fact is not that Congress managed to enact compromise legislation in 1980 but that, before the legislation became effective and ever since that time, legislators have introduced bills and resolutions the

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<sup>12</sup> See, e.g., Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 955 (1986-87).

<sup>13</sup> See Ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185, 192-93 (1938-39); cf. Peterson, *Recall of Judges and Impeachment*, 86 CENT. L.J. 242, 245 (1918) ("The movement for the recall of judges is largely based on dissatisfaction with the present system of impeachment.").

<sup>14</sup> See Blackmar, *supra* note 11, at 183.

<sup>15</sup> See SPECIAL SUBCOMM. ON H.R. RES. 920 OF THE HOUSE COMM. ON THE JUDICIARY, FINAL REPORT ON ASSOCIATE JUSTICE WILLIAM O. DOUGLAS, 91st Cong., 2d Sess. (1970). Appendix D to this report, occupying one hundred pages, contains the fact brief and a reply memorandum filed by Simon Rifkind, Justice Douglas' attorney.

<sup>16</sup> For example, on February 7, 1806, Representative Randolph introduced a resolution calling for a constitutional amendment to provide for removal by address. See 9 ANNALS OF CONG. 446 (1806); see also J. BORKIN, *THE CORRUPT JUDGE* 195-96 (1962) (the date given by Borkin for the Eighth Congress is incorrect); Bingham, *A Proposed Constitutional Amendment Regarding Impeachment Proceedings*, 65 U.S.L. REV. 323 (1931) (the author was a senator).

<sup>17</sup> See *supra* note 1.

<sup>18</sup> See Burbank, *supra* note 7, at 291-92 n.24; Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 1 (1938).

<sup>19</sup> See Burbank, *supra* note 7, at 291-94.



effect if not the purpose of which would have been to undo those hard-won compromises.<sup>20</sup>

Nor is this the first time that proposals for wholesale change have been introduced without serious attention to adjustments in current arrangements. That too has been the norm. The Senate's rules governing removal trials have changed very little since the trial of President Andrew Johnson in 1868.<sup>21</sup> A 1935

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<sup>20</sup> For proposed legislation, see H.R. 994, 98th Cong., 1st Sess. (1983); S. 3018, 97th Cong., 2d Sess. § 202 (1982); Burbank, *supra* note 7, at 347 n.276.

The number and character of proposed constitutional amendments affecting judicial tenure that have been introduced since 1980 are stunning. They may be grouped roughly as follows: (1) retention election: H.R.J. Res. 451, 97th Cong., 2d Sess. (1982) (every 6 years); (2) limited term and/or limited tenure: H.R.J. Res. 325, 100th Cong., 1st Sess. (1987) (6 year terms; 12 year limit); H.R.J. Res. 71, 100th Cong., 1st Sess. (1987) (10 years during any 12 year period); H.R.J. Res. 30, 99th Cong., 1st Sess. (1985) (10 years during any 12 year period); H.R.J. Res. 144, 98th Cong., 1st Sess. (1983) (10 years during any 12 year period); H.R.J. Res. 90, 98th Cong., 1st Sess. (1983) (8 years); H.R.J. Res. 51, 97th Cong., 1st Sess. (1981) (10 years during any 12 year period); H.R.J. Res. 8, 97th Cong., 1st Sess. (1981) (6 year terms; 12 year limit); S.J. Res. 24, 97th Cong., 1st Sess. (1981) (10 years but reappointment permitted to another court); (3) limited term unless Senate consents to continuance in office: H.R.J. Res. 168, 100th Cong., 1st Sess. (1987) (10 years); H.R.J. Res. 184, 99th Cong., 1st Sess. (1985) (10 years); H.R.J. Res. 628, 98th Cong., 2d Sess. (1984) (6 years); H.R.J. Res. 264, 98th Cong., 1st Sess. (1983) (10 years); H.R.J. Res. 490, 97th Cong., 2d Sess. (1982) (10 years); H.R.J. Res. 427, 97th Cong., 2d Sess. (1982) (6 years); (4) limited term unless President nominates and Senate consents to continuance in office: H.R.J. Res. 177, 100th Cong., 1st Sess. (1987) (Supreme Court Justices to serve 15 year terms but eligible for reappointment); H.R.J. Res. 557, 99th Cong., 2d Sess. (1986) (Supreme Court Justices to serve 15 year terms but eligible for reappointment); H.R.J. Res. 103, 99th Cong., 1st Sess. (1985) (10 years); S.J. Res. 30, 99th Cong., 1st Sess. (1985) (10 years); H.R.J. Res. 374, 98th Cong., 1st Sess. (1983) (10 years); H.R.J. Res. 252, 98th Cong., 1st Sess. (1983) (10 years); S.J. Res. 39, 98th Cong., 1st Sess. (1983) (10 years); H.R.J. Res. 60, 97th Cong., 1st Sess. (1981) (10 years); S.J. Res. 21, 97th Cong., 1st Sess. (1981) (10 years); (5) limited term and/or age restrictions: H.R.J. Res. 419, 97th Cong., 2d Sess. (1982) (10 year term and age limit of 70 for judges of inferior courts; no appointment to any federal court after attaining 60); (6) good behavior but removal by Senate resolution: H.R.J. Res. 56, 99th Cong., 1st Sess. (1985) (during 10th year of any 10 year period); H.R.J. Res. 17, 98th Cong., 1st Sess. (1983) (during 10th year of any 10 year period); H.R.J. Res. 570, 97th Cong., 2d Sess. (1982) (during 10th year of any 10 year period).

For other proposed constitutional amendments regarding tenure, see *supra* notes 5-6 and accompanying text. For another method of attack on the federal judiciary, see Feinberg, *Constraining "The Least Dangerous Branch": The Tradition of Attack on Judicial Power*, 59 N.Y.U. L. REV. 252 (1984) (attempts to limit the jurisdiction of federal courts).

<sup>21</sup> See *Senate Rules and Precedents Applicable to Impeachment Trials: Hearings Before the Comm. on Rules and Administration*, 93d Cong., 2d Sess. 171 (1974) [hereinafter *Senate Rules*] (letter from Hon. Mike Mansfield); Futterman, *The Rules of Impeachment*, 24 KAN. L. REV. 105, 105 (1975-76).

amendment authorizing evidence-taking by a committee,<sup>22</sup> which had been advocated as early as 1904,<sup>23</sup> was not availed of in the trial of Judge Ritter in 1936,<sup>24</sup> and the latter trial prompted not additional attention to Senate rules but attempts to avoid similar trials in the future.<sup>25</sup> Almost forty years later, when the Senate was next confronted with the serious prospect of a trial on articles of impeachment, its Rules Committee—understandably concerned about appearing to change the rules after the game had started—eschewed comprehensive overhaul in favor of minor adjustments.<sup>26</sup> After President Nixon defaulted, the Senate too left the court, its rules unchanged.<sup>27</sup> When a crisis loomed again in 1986, the Senate dusted off the 1974 proposed amendments and implemented them without change.<sup>28</sup>

This may, however, be the first time that Congress seriously considers constitutional amendments relating to the removal of federal judges. The vehicle of change—or should I say the change of vehicle—is not surprising in light of the animated constitutional debate that has attended statutory proposals over the last fifty years.<sup>29</sup> Moreover, recent attacks on Congress' 1980 compromise in the courts and in the literature<sup>30</sup> demonstrate the fragility of legislation in this area, even that which carefully

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<sup>22</sup> S. Res. 18, 74th Cong., 1st Sess. (1935); see 79 CONG. REC. 8309-10 (1935). For the history of use of committees by the Senate in impeachment trials, see *Procedure and Guidelines for Impeachment Trials in the United States Senate*, S. Doc. No. 102, 93d Cong., 2d Sess. 33-34 (1974). See also *infra* text accompanying notes 202-22.

<sup>23</sup> See 38 CONG. REC. 3360, 3992 (1904); J. BORKIN, *supra* note 16, at 197. Borkin was unaware of the 1935 change in the Senate rules. See *id.* Senator Hoar apparently made his proposal in anticipation of the impeachment and trial of Judge Swayne. See 38 CONG. REC. 3732 (1904).

<sup>24</sup> See, e.g., 80 CONG. REC. 4982 (1936).

<sup>25</sup> See *supra* text accompanying notes 17-18.

<sup>26</sup> See S. Res. 390, 93d Cong., 2d Sess. (1974); 120 CONG. REC. 29,811-13 (1974); see also, e.g., *Senate Rules*, *supra* note 21, at 8, 88, 95, 97.

<sup>27</sup> S. Res. 390, *supra* note 26, was laid on the table by motion of Senator Byrd on December 11, 1974. 120 CONG. REC. 39,054 (1974).

<sup>28</sup> See S. Res. 479, 99th Cong., 2d Sess. (1986); 132 CONG. REC. S11,902-03 (daily ed. Aug. 15, 1986).

<sup>29</sup> See Burbank, *supra* note 7, at 291-308. In fact, this represents a return to the vehicle originally proposed. See *supra* text accompanying note 16.

<sup>30</sup> See, e.g., *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (1984), *aff'd in part and vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 3272 (1986); Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1984-85).

excepts removal. The record of the debate and awareness of current attacks should suffice to persuade today's legislators that removal pursuant to statute is unlikely to survive constitutional challenge.

Proceeding by way of constitutional amendment has the distinct advantage of mooted arguments rooted in the decent obscurity of arrangements framed two hundred years ago. Congress is spared the difficult and hazardous task of restoration. A new canvas is available for the work of contemporary artists and the judgment of contemporary critics, both of them at least formally unencumbered by traditions if not by conventions.

Conventions are, of course, a distinct disadvantage in the art of constitutional amendment.<sup>31</sup> The work of the artists, expensive enough to create, has no market until it has been approved by a process of critical judgment that is vastly more expensive. No matter what the subject, the transaction costs of a constitutional amendment are enormous, and they increase as the subject becomes more controversial.

Moreover, even contemporary artists should hesitate to urge that their work, however distinguished, replace one panel of a triptych by old masters that has been displayed for two hundred years. When the subject of a proposed constitutional amendment involves matters that are basic to the operations of one branch of the federal government, transaction costs are as nothing compared to the costs of potential error in treating a polycentric problem<sup>32</sup> as if it had only one dimension.

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<sup>31</sup> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V. See generally M.F. BERRY, *WHY ERA FAILED* (1986).

<sup>32</sup> One useful approach, developed by Lon Fuller, is the concept of the "polycentric" ("many-centered") problem. As described by Fuller, the polycentric issue is characterized by a large number of possible results and by the fact that many interests or groups will be affected by any solution adopted; thus, each potential solution will have complex and unique ramifications. In graphic terms, the polycentric controversy can be visualized as



This Essay is intended as a cautionary note to those who, quite correctly, have concluded that constitutional amendment is the only way to replace current arrangements for the removal of federal judges. It proceeds from the premise that an independent federal judiciary is essential to the maintenance of the delicate balance of federal powers<sup>33</sup> and that, therefore, proposals that might diminish the judiciary's independence should emerge from a process of wide-ranging and careful study. I take the position that, because the stakes are so high, the process should include comparative assessment not just of current arrangements and proposed alternatives under a new constitutional grant but also of adjustments that might be made with fidelity to the provisions of the Constitution and thus without change to those provisions.

The problem of removal of federal judges must be set in context. The relevant contexts include both the place of judicial independence in our scheme of government and the place of removal in the arsenal of weapons available to deal with misbehaving or disabled federal judges. Assuming general agreement as to the first, I will operate largely within the second. Change by constitutional amendment should be deferred until it is clear that adjustments faithful to the Constitution would be either an inadequate response to perceived problems or a demonstrably less satisfactory response than the alternatives.

## I. A SURVEY OF CURRENT ARRANGEMENTS

It may be hard for us to imagine a federal judiciary that is not independent, because we have never known it any other way. The framers were, however, acutely conscious of the dangers of

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a spider web, since "[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole . . . . [E]ach crossing of strands is a distinct center for distributing tension."

Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 116-17 (1972-73) (footnotes omitted).

<sup>33</sup> See, e.g., Greenhouse, *House Unit Concludes Federal Judges Cannot Be Impeached for Their Rulings*, N.Y. Times, Oct. 28, 1986, at 3, col. 1. But see *supra* note 20 (listing numerous proposals for constitutional amendments within the last seven years that would diminish if not destroy the independence of federal judges).

domination of the judiciary, and they sought to prevent such domination by provisions guaranteeing tenure during good behavior and undiminished compensation.<sup>34</sup> Moreover, although arguments have emerged during the last fifty years or so asserting that a federal judge can be removed by means other than that specifically provided in the Constitution,<sup>35</sup> both the text<sup>36</sup> and the views of its earliest expositors<sup>37</sup> affirm the verdict of history in favor of the exclusivity of the impeachment process.<sup>38</sup>

The framers recognized that the impeachment process would be arduous; indeed, by rejecting a substantive norm of great elasticity, they signaled an intent to ensure that it not be lightly commenced.<sup>39</sup> Their deliberations, however, revolved chiefly around the President, who would be subject to periodic elections.<sup>40</sup> Federal judges are not so subject, and for that reason alone, it is important to consider the entire array of checks against their misconduct or disability.

#### A. *The Appointments Process*

The appointments process for federal judges constitutes a first line of defense.<sup>41</sup> There is no excuse for the President to

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<sup>34</sup> "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1; see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 428-30 (M. Farrand rev. ed. 1966) [hereinafter Farrand]; THE FEDERALIST NOS. 78 & 79 (A. Hamilton); 1 THE WORKS OF JAMES WILSON 323-31 (R. McCloskey ed. 1967).

<sup>35</sup> See, e.g., R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 122-80 (1973); Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870 (1929-30).

<sup>36</sup> See *supra* note 1.

<sup>37</sup> See THE FEDERALIST NOS. 78 & 79 (A. Hamilton); 1 THE WORKS OF JAMES WILSON, *supra* note 34, at 326; W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 208 (1825); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1629 (1833); see also *id.* §§ 1625-26.

<sup>38</sup> See, e.g., H.R. REP. NO. 1313, 96th Cong., 2d Sess. 17-18 (1980); Otis, *supra* note 18, at 3-10.

<sup>39</sup> See 2 Farrand, *supra* note 34, at 550.

<sup>40</sup> See *id.* at 64-69.

<sup>41</sup> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . ." U.S. CONST. art. II, § 2.

nominate to the federal bench a person whose life to that point contains substantial evidence, accessible to skilled investigators, of, or of vulnerability to, misconduct or disability that would be unacceptable in a judge. There is similarly no excuse for the Senate to confirm a nominee in the absence of proof of skilled investigation and of the informed judgment of the nominee's peers concerning his or her character and fitness for judicial office.<sup>42</sup>

### *B. Retirement and Disability Statutes*

Physical or mental disability may not be detectible through skilled investigation; they may not exist or may not be foreseeable at the time of appointment. It is hard to view insanity as a species of "[t]reason, [b]ribery, or other high [c]rime[] and [m]isdemeanor[]"<sup>43</sup> and equally hard to believe that the framers consigned us to the ravings of a lunatic judge until death. Hamilton dealt with the subject in a passage of exquisite ambiguity.<sup>44</sup> The removal of Judge Pickering can be laid to other

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<sup>42</sup> The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive. If an ill appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.

THE FEDERALIST No. 77, at 94 (A. Hamilton) (E. Bourne ed. 1901).

<sup>43</sup> U.S. CONST. art. II, § 4.

<sup>44</sup> The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.

THE FEDERALIST No. 79, *supra* note 42, at 109 (A. Hamilton).

After repeating much of this passage, Justice Story concluded: "And instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision." 3 J. STORY, *supra* note 37, at § 1619.

grounds, although he apparently was insane.<sup>45</sup> The disabled federal judge has been a problem throughout our history, both in his own right and as a tool of the corrupt,<sup>46</sup> but the problem was one that Congress *always* had the power to correct and that it has now gone far to correct. Sensible and humane statutes governing retirement,<sup>47</sup> disability,<sup>48</sup> senior status,<sup>49</sup> and annuities<sup>50</sup> should spare us another Pickering. The 1980 Act completed the remedial scheme with provisions that, albeit more controversial, address the situation of a disabled judge who cannot or will not accept what is apparent to everybody else.<sup>51</sup>

### C. *The Shadow of the Impeachment Process*

Misconduct may not be the habit of a lifetime; indeed, life tenure may bring it forth. In addition, not every species of misconduct by a federal judge warrants impeachment and removal. The costs of the process ensure that the presumption runs the other way. How then can it be true, as one student of judicial corruption has concluded, that those few federal judges who have been the subject of a solemn judgment of removal by the Senate are, in a hierarchy of judicial infamy, the misdeameanants rather than the felons?<sup>52</sup> Part of the answer may lie

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<sup>45</sup> See HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., IMPEACHMENT, SELECTED MATERIALS ON PROCEDURE 381-409 (Comm. Print 1974) [hereinafter IMPEACHMENT, SELECTED MATERIALS ON PROCEDURE]; J. BORKIN, *supra* note 16, at 198-99; P. HOFFER & N. HULL, *supra* note 11, at 207-20.

<sup>46</sup> See, e.g., J. BORKIN, *supra* note 16, at 100-01 (Judge Buffington).

<sup>47</sup> See 28 U.S.C. § 371 (1982).

<sup>48</sup> See *id.* at § 372.

<sup>49</sup> See *id.* at § 294.

<sup>50</sup> See *id.* at § 376.

<sup>51</sup> The actions a judicial council may take upon receipt of a report of a special committee appointed to investigate a complaint include:

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint. . . .

*Id.* at § 372(c)(6).

<sup>52</sup> See J. BORKIN, *supra* note 16, at 195.

in the fact that, however ponderous, the constitutional arrangements have provided a sufficiently credible threat to prompt numerous federal judges to resign rather than risk impeachment and removal.<sup>53</sup> Some of those individuals, apparently, saw the shadow not of Jefferson's "scare-crow"<sup>54</sup> but of Lord Bryce's "hundred-ton gun."<sup>55</sup> The gun was in mothballs for fifty years. It casts a shadow again.

#### *D. The Criminal Process*

Another part of the answer may lie in the influence of the criminal process on decisions to resign. The proper place of that process under current constitutional arrangements is a difficult question and one that I explore later in this Essay.<sup>56</sup> For the present, it is enough to note that, even when the criminal prosecution of a sitting federal judge was even rarer than it is today, the efforts of exasperated public prosecutors helped to stimulate some of the most corrupt federal judges to resign.<sup>57</sup>

#### *E. The 1980 Act*

What then about federal judges who misbehave but are not corrupt, or at least not so corrupt as to attract the attention of public prosecutors or the sustained attention of Congress? There's

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<sup>53</sup> See *id.* at 27-28, 120, 181, 195, 200-04, 219-58. Of course, even the innocent may have concluded that the office was not worth the embarrassment and expense of impeachment proceedings.

<sup>54</sup> "For experience has already shown that the impeachment [the Constitution] has provided is not even a scare-crow." Letter from Hon. Thomas Jefferson to Hon. Spencer Roane (Sept. 6, 1819), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON 141 (P. Ford ed. 1899).

<sup>55</sup> Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of power to fire it, and a large mark to aim it.

1 J. BRYCE, THE AMERICAN COMMONWEALTH 283 (1888).

<sup>56</sup> See *infra* text accompanying notes 102-38.

<sup>57</sup> Two of the judges whose careers are chronicled by Borkin, United States Senior Circuit Judge Martin Manton and United States District Judge Albert Johnson, were probably influenced to resign both by the impeachment process and by the criminal process. See J. BORKIN, *supra* note 16, at 27-28, 181-83; see also 126 CONG. REC. 25,371 (1980) (statement of Rep. Rodino); J. BORKIN, *supra* note 16, at 255-56 (United States District Judge Winslow).



the rub. Modern federal judicial administration dates from a period of extraordinary public attention to problems of judicial corruption.<sup>58</sup> But the powers given to the arms of federal judicial administration, and in particular the judicial councils of the circuits, were not well defined in 1939, and their capacity to deal with judicial misbehavior remained in doubt for years.<sup>59</sup> A 1970 Supreme Court decision in a case brought to challenge the exercise of those powers hardly resolved the doubts.<sup>60</sup> That was one of the main goals of Congress in enacting the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.<sup>61</sup>

By clarifying the authority of the judiciary to consider complaints of misconduct or disability and by providing a process and procedural charter for such consideration, as well as a partial but limiting enumeration of responsive actions, the 1980 Act fills a gaping hole in society's defense against the excesses of life tenure.<sup>62</sup> If well and faithfully implemented, it can serve as both credible supplement and credible alternative to the process of impeachment and removal. In this case, "supplement" and "alternative" are not euphemisms for replacement. Congress attempted to ensure that the Act not supplant the constitutionally prescribed process in matters of sufficient gravity to suggest the need for it<sup>63</sup> and that, in any event, it could not be used to

<sup>58</sup> The judicial councils of the circuits were created by the Administrative Office Act of 1939, ch. 501, 53 Stat. 1223. See generally P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 125-65, 379-426 (1973). For the link in the text, see *id.* at 114.

<sup>59</sup> See Burbank, *supra* note 7, at 291-92, 294.

<sup>60</sup> See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970).

<sup>61</sup> See H.R. REP. NO. 1313, *supra* note 38, at 1, 7.

<sup>62</sup> See generally Burbank, *supra* note 7; Burbank, *The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?*, 67 JUDICATURE 183 (1983-84); Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, 71 JUDICATURE 13 (1987-88) [hereinafter *Politics and Progress*].

<sup>63</sup> (B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct—

(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,  
the judicial council shall promptly certify such determination, together with

remove a federal judge.<sup>64</sup> Moreover, in cases of such gravity, Congress hoped that proceedings under the Act would yield a record that would measurably lighten the burden of exercising its constitutional responsibilities.<sup>65</sup> In either situation, when alleged misconduct is not grounds for impeachment and removal and when it may be, the Act can take the pressure off the constitutionally prescribed process and cast a shadow of its own. Whether it will be permitted to fulfill its potential, by the body responsible for its passage, the bodies responsible for its implementation, or by the courts, are matters to which I shall return.

### *F. Informal Approaches*

Finally in this survey of current arrangements, it is important to note the role of informal approaches to problems of misconduct or disability in the federal judiciary. At one time it was probably the case that collegial or hierarchical suasion was the most common and effective supplement to the impeachment process, at least when the latter was not a credible threat.<sup>66</sup> Although the 1980 Act has tended to divert attention from informal processes, Congress did not intend to supplant them.

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any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

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(8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the records of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

28 U.S.C. §§ 372(c)(7)(B) & (8) (1982).

<sup>64</sup> The Act provides that "in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior." *Id.* at § 372(c)(6)(B)(vii).

<sup>65</sup> See, e.g., 126 CONG. REC. 28,097 (1980) (statement of Senator Thurmond); Burbank, *supra* note 7, at 304 n.85.

<sup>66</sup> See R. WHEELER & A. LEVIN, JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES 9, 13-14, 74 (1979).

Indeed, to the extent that the Act clarified the existence of formal power, they should be stronger.<sup>67</sup>

## II. ADJUSTMENTS IN CURRENT ARRANGEMENTS

The transaction costs of a constitutional amendment are such that, whatever the subject, that course should be pursued only when it is clear that the problem cannot be addressed satisfactorily and at less cost by adjustments in current arrangements. When the problem implicates an essential attribute of one branch of the federal government, the error costs to be considered are enormous, additional reason to proceed cautiously.

It may not be fair to tax legislators who have recently proposed constitutional amendments regarding federal judicial discipline with undue haste, as their proposals can be viewed as merely vehicles for inviting the kind of broad-ranging and careful comparative assessment that, I have argued, is necessary in light of the stakes involved. To advance such an assessment, this section will explore possible adjustments in current arrangements that might make them more effective in dealing with the problems that have been identified. First, however, it is necessary to state those problems.

Some of the recent proposals were animated by the sense that, when a federal judge has been convicted of a felony and has exhausted direct appeals but nevertheless refuses to resign, the costs of the impeachment process are simply too great and that a more efficient remedy is appropriate.<sup>68</sup> Some of the proposals, however, proceed from the view that the costs of removing *any* federal judge, criminally convicted or not, are too great under current arrangements,<sup>69</sup> and one of them purports to derive support for the conclusion from the alleged ineffectiveness

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<sup>67</sup> See, e.g., 126 CONG. REC. 25,371 (1980) (statement of Rep. Rodino); *id.* at 28,092 (1980) (statement of Sen. DeConcini); Burbank, *Politics and Progress*, *supra* note 62, at 22; Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported Informal Responses*, 71 JUDICATURE 282 (1988).

<sup>68</sup> See *supra* note 5; 132 CONG. REC. S7867 (daily ed. June 18, 1986) (statement of Sen. DeConcini); *Hearing on S.J. Res. 364 & S.J. Res. 370*, *supra* note 5, at 30-31 (statement of Stephen B. Burbank).

<sup>69</sup> See *supra* note 6; 132 CONG. REC. S4990-91 (daily ed. Apr. 9, 1987) (statement of Sen. Heflin); *id.* at S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini).

of the 1980 Act as a supplement to the constitutionally prescribed process.<sup>70</sup>

In considering how current arrangements might be adjusted to minimize costs, logic suggests starting with means to avoid invocation of the impeachment process. That process, we have seen, is the last defense against the excesses of life tenure. What changes are possible in, or at least what questions should be asked about, all lines of defense?

### A. *The Appointments Process*

Criticisms of the appointments process tend to focus on the means by which those involved in the process, formally and informally, assess the intellectual and the experiential qualifications of potential and actual nominees.<sup>71</sup> It may be that, recognizing the limitations of even a skilled investigation of moral character and fitness for judicial office, little room for improvement exists in that aspect of current appointments practice. At the least, however, it would be useful to confirm that background investigations are being conducted on all nominees to an article III position,<sup>72</sup> that they are being conducted by skilled

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<sup>70</sup> See 132 CONG. REC. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini).

<sup>71</sup> See S. Res. 459, 98th Cong., 2d Sess. (1984); 127 CONG. REC. S12,529-32 (daily ed. Oct. 1, 1984) (statement of Sen. Specter); *ABA Takes Heat on Hill over Rating of Bork*, Nat'l. L.J., Oct. 5, 1987, at 5.

<sup>72</sup> Those who find this question silly should endeavor to answer it. I have been told by a confidential source, but have been unable to verify, that something was badly amiss in the background work on Harry Claiborne. If that is true, the Senate should have spared us the hand-wringing about his impeachment trial.

At the Senate Judiciary Committee hearing on Claiborne's nomination, the following was the full extent of questioning:

Senator DeConcini. Thank you. Have you made a full financial disclosure to the Department of Justice?

Mr. Claiborne. Yes, I have.

Senator DeConcini. And have you received a questionnaire from Senator Mathias?

Mr. Claiborne. Yes sir; I have, and I have answered them.

Senator DeConcini. Do you hold any positions in or are you a member of any board of directors of any corporations?

Mr. Claiborne. I do not.

Senator DeConcini. Thank you. I have no further questions.

*Nominations of Harry E. Claiborne, et al.: Hearings Before the Senate Comm. on the*

investigators, and that the latter are pursuing appropriate avenues of inquiry, with appropriate thoroughness. To what extent are those conducting the investigations expected or permitted to provide a record not just about moral character and fitness but also about intellectual ability? If they do pursue both lines of inquiry, is the practice likely to diminish the effectiveness of the investigation as to both because it precludes the investigators' full attention to either, including by skewing the sample of those consulted?<sup>73</sup> These and other questions about the information available to those involved in the appointments process should be explored both from a normative perspective and with the benefit of analysis of the pre-appointment material on federal judges of recent notoriety, to the extent such material exists.<sup>74</sup>

### *B. Retirement and Disability Statutes*

Although current statutes regarding retirement, disability, senior status, and annuities appear, at last, adequate to remove the main incentive for a physically or mentally disabled judge to remain on the bench after his time, it would be a simple task to confirm that fact with those most likely to be aware of any problems, the chief judges of the district courts and of the courts of appeals. Moreover, because financial incentives do not exhaust the possible reasons for continuation in active service, the proposed inquiry should include an assessment of the effective-

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*Judiciary*, 95th Cong., 2d Sess. 6 (1978) (transcript), printed in REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE: HEARINGS ON THE IMPEACHMENT OF HARRY E. CLAIRBORNE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT COURT OF NEVADA, OF HIGH CRIMES AND MISDEMEANORS BEFORE THE SENATE IMPEACHMENT TRIAL COMM., S. HRG. REP. NO. 812, 99th Cong., 2d Sess. 2259 (1986) [hereinafter REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE].

For criticisms of the confirmation process and suggested improvements, see, e.g., Jost, *No More Assembly-Line Nominations*, Legal Times, Nov. 16, 1987, at 16. For recent essays on that process with regard to appointments to the Supreme Court, see *Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146 (1988).

<sup>73</sup> These questions are prompted by my experience in an interview with an FBI agent regarding an individual who was subsequently confirmed as an article III judge. Most of the interview consisted of questions attempting to probe the individual's views about law and politics. Very few of them, and those presented by the agent as *pro forma*, concerned moral character and fitness.

<sup>74</sup> See *supra* note 72.



ness of the 1980 Act in helping the federal judiciary with the painful business of bearing bad news.<sup>75</sup>

### C. *The 1980 Act*

The 1980 Act was not addressed primarily to the problem of the disabled judge, and its effectiveness in helping to remedy and to deter misconduct is a critical question to be addressed in a comparative assessment of the sort advocated here. Happily, there is already a good deal of information available that bears on that question, and it is possible to hazard some answers as well as pose some additional questions.

Contrary to the assertions of a senator who has sought to use the alleged ineffectiveness of the 1980 Act as support for a constitutional amendment to implement a wholly new system for remedying misconduct, including by removal, the record of the federal judiciary under that Act has hardly been one of "inactivity."<sup>76</sup> Since October 1981, when the Act became effective, 1153 complaints have been filed, of which forty-seven remained pending on June 30, 1987.<sup>77</sup> It is true that chief judges have dismissed most of the complaints filed under the Act, but that was to be expected, and Congress did expect it.<sup>78</sup> As an interested and relatively well-informed student of the Act and its implementation, I have seen no evidence that those charged with responsibilities in the process of complaint disposition have failed in the exercise of those responsibilities. The information presently available suggests that the Act is working and that the explanation for the small number of complaints that have required investigation and the even smaller number that have required action by a judicial council lies in the generally high

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<sup>75</sup> The inquiry should include both formal and informal actions. As to the former, see *In re the Complaint Against a District Judge Under 28 U.S.C. § 372(c)* (3d Cir. Judicial Council 1982) (order requesting disabled judge to retire voluntarily under 28 U.S.C. § 372(c)(6)(B)(iii)) (copy on file with the author).

<sup>76</sup> 132 CONG. REC. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini); see Burbank, *Politics & Progress*, *supra* note 62, at 22.

<sup>77</sup> See 1987 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR 92-95.

<sup>78</sup> See Burbank, *supra* note 7, at 322.

quality of the federal bench.<sup>79</sup> Support for an alternative explanation, if it exists, will only be found after a detailed analysis of complaints and their disposition. That will require hard work rather than easy assertion; it may even require a statutory amendment.<sup>80</sup>

It is also not true, as asserted by the same senator, that the judicial councils “have not even come up with rules and guidelines for the conduct of their operations,”<sup>81</sup> although their efforts in that regard have been the object of criticism.<sup>82</sup> Most of the criticisms may soon be moot, as the councils respond to the Judicial Conference’s recommendation that they substantially adopt, on an experimental basis, illustrative rules prepared by a special subcommittee of the Conference of Chief Judges of the Court of Appeals.<sup>83</sup> The illustrative rules provide answers, usually sensible answers, to most of the procedural questions uncertainty about which was harmful to Congress’ goal of improving public accountability while protecting the independence of federal judges. Moreover, if most of the councils adopt them in substantial part, as recommended by the Conference, the answers will be substantially uniform, with a consequent reduction in the costs of disuniformity to the attainment of Congress’ goals.<sup>84</sup>

Apart from the uninformed assertions of an unreconstructed proponent of another scheme, perceptions of the Act’s effectiveness have been adversely affected by two developments, one discrete and easily addressed, the other more widespread and more intractable.

Some members of Congress were evidently unhappy that, once Judge Claiborne had exhausted direct appeals from his

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<sup>79</sup> See Burbank, *Politics and Progress*, *supra* note 62, at 22. As noted there, “the statistics do not give a clear picture of the role that informal adjustments play, either after a complaint has been filed—chief judges have concluded 37 proceedings under the Act on the ground that appropriate corrective action had been taken—or in the absence of a formal complaint.” *Id.* See also Fitzpatrick, *supra* note 67.

<sup>80</sup> See 28 U.S.C. § 372(c)(14) (1982) (confidentiality of “[a]ll papers, documents, and records of proceedings related to investigations” with limited exceptions); see also Burbank, *Politics and Progress*, *supra* note 62, at 20-21.

<sup>81</sup> 132 CONG. REC. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini).

<sup>82</sup> See Burbank, *supra* note 7, at 309-46.

<sup>83</sup> The text of the illustrative rules is reprinted in Burbank, *Politics and Progress*, *supra* note 62, at 23-28.

<sup>84</sup> See *id.* at 15-22.

felony conviction, the Judicial Council of the Ninth Circuit did not more promptly invoke a section of the Act providing for a certification of a determination that an article III judge "has engaged in conduct . . . which might constitute one or more grounds for impeachment under article I (sic) of the Constitution."<sup>85</sup> I have explored elsewhere possible reasons for the delay and pointed out that, in any event, the certification process is a mere formality in a case like Judge Claiborne's, which was notorious and the factual underpinnings of which were fully developed in a court record.<sup>86</sup> It is not clear, in other words, whether members of Congress had good reason to be unhappy, and the experience is hardly evidence of the ineffectiveness of the Act generally. The certification process has been used twice again;<sup>87</sup> rules adopted by the Judicial Conference at its September 1987 meeting should help,<sup>88</sup> and if need be, any remaining problems can be addressed by statutory amendment.<sup>89</sup>

A more serious threat to the effectiveness of the 1980 Act, which depends in consequential measure on perceptions of its effectiveness, arises from continuing uncertainty about its constitutionality. Just as some members of Congress continue to believe that, as a compromise, the legislation did not go far enough, others, in Congress and out, believe that it went too far. The broadest attack argues that the impeachment process is the exclusive means not only to remove an article III judge but to constrain such a judge in the exercise of the duties of office

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<sup>85</sup> 28 U.S.C. § 372(c)(7)(B) (1982), *quoted in full supra* note 63.

<sup>86</sup> See *Hearing on S.J. Res. 364 & S.J. Res. 370, supra* note 5, at 32-33 (statement of Stephen B. Burbank); see also Burbank, *Politics and Progress, supra* note 62, at 22 n.113.

<sup>87</sup> See *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 96-97 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3715 (U.S. Apr. 18, 1988) (Judge Hastings); Rodino Announces Impeachment Inquiry, *supra* note 4 (Judge Nixon).

<sup>88</sup> See *Rules of the Judicial Conference of the United States for the Processing of Certificates from Judicial Councils That a Judicial Officer Has Engaged in Conduct That Might Constitute Grounds for Impeachment*, 1987 Reports of the Proceedings of the Judicial Conference of the United States 97-99 (Washington, D.C. Mar. 17, 1987 & Sept. 21, 1987).

<sup>89</sup> See H.R. 4393, 100th Cong., 2d Sess. § 101(d) (1988) (proposing special transmittal process in case of judge or magistrate convicted of felony who has exhausted direct appeals); *Hearing on S.J. Res. 364 & S.J. Res. 370, supra* note 5, at 33 (statement of Stephen B. Burbank).

for reasons of alleged misconduct or disability.<sup>90</sup> Narrower attacks may focus on a particular constraint authorized by the Act, on the procedures specified therein or those actually employed for complaint disposition, on the certification process, or for that matter, on a host of other provisions or practices.<sup>91</sup>

There is little that can or should be done to prevent attacks on the 1980 Act, whether they take the form of commentary in journals or pleadings in a lawsuit.<sup>92</sup> Those who are disturbed by, as well as those making, such attacks should recall that most of the issues currently being raised were aired with unusual thoroughness during the long legislative process yielding the ultimate compromise and that the framers of that legislation were unusually candid and careful in attempting to meet and to resolve constitutional objections.<sup>93</sup> Until such time as the Supreme Court authoritatively holds to the contrary, we should assume that they were successful. Indeed, this may be a subject about which responsible members of Congress should be sufficiently concerned to monitor the quality of the defense of its efforts in any litigation challenging their constitutionality.

For those who believe that the constitutional provisions regarding article III judges are “underdeterminate”<sup>94</sup>—in the present climate, a population that probably is growing—it may be

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<sup>90</sup> See, e.g., 126 CONG. REC. 28,093-97 (1980) (statement of Sen. Mathias); Note, *supra* note 30.

<sup>91</sup> See, e.g., *Hastings v. Judicial Conference of the United States*, 657 F. Supp. 672 (D.D.C. 1986), *aff'd in part and rev'd in part*, 829 F.2d 91 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3715 (U.S. Apr. 18, 1988); *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984), *aff'd in part and vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 3272 (1986).

<sup>92</sup> *But see* 28 U.S.C. § 372(c)(10) (1982) (“Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.”). In remanding some of Judge Hastings’ due process claims, the court of appeals noted that “sensitive and unsettled questions of constitutional law would arise if the challenged actions are covered by the prohibition of judicial review.” *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 108 n.69 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3715 (U.S. Apr. 18, 1988).

<sup>93</sup> See H.R. REP. NO. 1313, *supra* note 38, at 2-5, 16-19; Burbank, *supra* note 7, at 291-300; Kastenmeier and Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 771-73 (1987-88) [hereinafter Kastenmeier].

<sup>94</sup> See Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

appropriate to note that the major compromises in the 1980 Act were *in favor of judicial independence*<sup>95</sup> and that, when the vehicle of change is a constitutional amendment, two-hundred-year-old bets are off.

The last is also fair comment to those in the federal judiciary, whether originally opponents of the 1980 legislation or just the reluctant recipients of the workload it imposes, who wish that it would go away. Indeed, because federal judges are an important part of the legal climate, we may expect that some of them would include consideration of alternatives in deciding, as judges, what the Constitution permits, even if they would not admit it.<sup>96</sup>

The pressing need at this point is for authoritative resolution(s) of constitutional attacks on the 1980 Act. That there has been no such resolution to date has not been for lack of effort by Judge Hastings, an individual who was intensely and personally interested in upsetting proceedings under the Act before they upset him.<sup>97</sup> Some of the grounds of attack have been rejected by the courts that considered them; a number have been deferred and may never be reached at his instance.<sup>98</sup> Perhaps the deferrals were justified, although in future cases, courts may wish to consider whether continued deferrals will yield no review and whether the chill to the Act's effectiveness bred by continuing

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<sup>95</sup> See Burbank, *supra* note 7, at 283-84, 291-308.

<sup>96</sup> For a sense of the alternatives, see *supra* note 20. We may also expect that judges would be aware of if not influenced by the fact that the 1980 legislation was based on a bill approved by the Judicial Conference. See Burbank, *supra* note 7, at 300.

<sup>97</sup> In addition to the cases cited *supra* note 91, see *Williams v. Mercer*, 610 F. Supp. 169 (S.D. Fla. 1985), *aff'd in part and rev'd in part sub. nom. In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir.), *cert. denied sub. nom. Hastings v. Godbold*, 106 S. Ct. 3273 (1986); *In re Petition to Inspect and Copy Grand Jury Materials*, 576 F. Supp. 1275 (S.D. Fla. 1983), *aff'd*, 735 F.2d 1261 (11th Cir.), *cert. denied sub. nom. Hastings v. Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 469 U.S. 884 (1984); *cf. United States v. Hastings*, 695 F.2d 1278 (11th Cir.), *reh'g en banc denied*, 704 F.2d 559 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983); *United States v. Hastings*, 681 F.2d 706 (11th Cir.), *reh'g en banc denied*, 689 F.2d 192 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

The change of venue to the House of Representatives has not deterred Judge Hastings. See *In Re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072 (S.D. Fla.), *aff'd*, 833 F.2d 1438 (11th Cir. 1987); *In re Grand Jury Proceedings*, 841 F.2d 1048 (11th Cir. 1988).

<sup>98</sup> See, e.g., *Hastings*, 829 F.2d at 91; *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 3272 (1986).



uncertainty about the constitutionality of one or more of its provisions renders passivity no longer virtuous.<sup>99</sup> At the least, one would hope not to see again a supposed exercise in passivity the effect if not the purpose of which is to create such a chill.<sup>100</sup>

When there has been authoritative resolution of the constitutional questions raised by the 1980 Act's detractors, and unless the result of that resolution is to adopt the position of those making the broadest attack—a result I deem extremely improbable—any defects in the Act can be corrected by amendments. In the meantime, Congress should give the Act a chance to work as it was intended to work. That means both refraining from unsupported attacks on its implementation by the federal judiciary in garden variety matters and focusing close attention on the fruits of its process in matters that reach the impeachment market. Congress should also correct by amendment defects that have been identified in the oversight process but that are not of constitutional significance.<sup>101</sup>

#### D. *The Criminal Process*

We have seen that criminal investigations played a role in persuading some federal judges to resign.<sup>102</sup> More recently, we have twice witnessed the failure of a criminal conviction, affirmed on appeal, to have that effect.<sup>103</sup> The proper role of criminal law enforcement in society's defense against judicial misbehavior is a difficult and important question, whether ap-

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<sup>99</sup> Compare A. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962) ("The Passive Virtues") with Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

<sup>100</sup> See *Hastings*, 770 F.2d at 1104-11 (Edwards, J., concurring).

<sup>101</sup> See H.R. 4393, 100th Cong., 2d Sess. § 101 (1988); *Oversight Hearing*, *supra* note 8, at 33-36 (statement of Stephen B. Burbank); Kastenmeier, *supra* note 93, at 781-89.

The provisions in the Act that seem to me most vulnerable to constitutional challenge are section 372(c)(6)(iv), quoted *supra* note 51, and section 372(c)(7)(B), quoted *supra* note 63. The problem with the latter could be solved if the words "has engaged" were changed to "may have engaged," as proposed in H.R. 4393, *supra*.

<sup>102</sup> See *supra* text accompanying note 57.

<sup>103</sup> Representative Sensenbrenner listed a "number of dubious distinctions that [Judge] Claiborne . . . achieved," including that he was "the first sitting Federal Judge in [our] history to go to prison." 132 CONG. REC. H4718 (daily ed. July 22, 1986). Judge Nixon is the second. See *supra* note 4.

proached from the relatively formal perspective of constitutional law or from the perspective of wise public policy.

As to constitutional law, this is another matter on which we would benefit from authoritative guidance, although the number of criminal prosecutions of federal judges in recent years suggests that federal prosecutors are not deterred by the absence of a Supreme Court holding on the constitutionality of prosecuting or imprisoning a sitting federal judge.<sup>104</sup> Because, however, the lower court decisions on the question may not persuade<sup>105</sup> and because a comparative assessment of the sort advocated in this Essay should consider the future of criminal prosecutions, as well as their past, it may be useful to attempt to confine the field of debate.

As a matter of constitutional law, the *prosecution* of a federal judge before that individual had been removed pursuant to the impeachment process might be thought to violate article I, section 3, clause 7. That clause provides that

[j]udgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall, nevertheless, be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.<sup>106</sup>

The *imprisonment* of a sitting federal judge might be thought to violate both that provision and article II, section 4, which provides that “[t]he President, Vice President and all civil Of-

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<sup>104</sup> There is, however, dictum to support the prosecutors. See *United States v. Lee*, 106 U.S. 196, 220 (1882) (dictum); see also *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 140 (Douglas, J., dissenting); *id.* at 141-42 (Black, J., dissenting); cf. *United States v. Brewster*, 408 U.S. 501, 516 (1972) (rejecting senator's claim that speech or debate clause precluded prosecution).

<sup>105</sup> See *United States v. Claiborne*, 727 F.2d 842 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); *Hastings*, 681 F.2d at 706; *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

This part of my work was prompted by student work-in-progress that has now been published. See Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420 (1988). I am grateful to the author of that note, Ms. Melissa Maxman, for sharing drafts with me and hopeful that, although we disagree, our exchange of views has been as stimulating for her as it has for me.

<sup>106</sup> For other relevant provisions, see *supra* note 1.

ficers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

The formal constitutional argument against prosecution before removal through the impeachment process would impute to the language, “but the Party convicted shall, nevertheless, be liable and subject to [criminal proceedings],” an intent by the framers and ratifiers of the Constitution to establish a strict order of precedence.

As a matter of language, the words almost certainly should not be read that way. Their context demonstrates that the people who wrote them were concerned lest a person “convicted” be able to abort criminal prosecution by invoking common law principles of double jeopardy and that their words were designed to meet that specific case.<sup>107</sup> As Raoul Berger has pointed out, “nevertheless” means “in spite of” not “afterwards.”<sup>108</sup> Nevertheless, because the provision in question does refer to one who has been “convicted,” and although the context dictated that choice, a linguistic inquiry is perhaps not decisive.

Professor Berger sought support for his view that indictment and trial (even of a president) may precede removal by resorting to English practice, noting that “[o]n several occasions the Parliament preferred to refer the case to the courts.”<sup>109</sup> This is not helpful because, as Berger himself elsewhere recognized, in English practice “criminal punishment and removal were wedded in one proceeding,”<sup>110</sup> whereas the framers made an informed decision to divorce them.

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<sup>107</sup> The purpose of the clause as a whole was to specify the limits of a judgment of conviction following a Senate trial and in particular to implement the framers’ intent to depart from the English practice of conflating the impeachment process and the criminal process. See *infra* text accompanying notes 116-19. The sentence in question, making clear that those limits did not include immunity from criminal prosecution, used the words, “the Party convicted,” because those were the words that the larger context required.

<sup>108</sup> Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1128 (1973-74).

<sup>109</sup> *Id.* at 1126.

<sup>110</sup> *Id.* at 1124. “Berger has written a brief, not a history. Missing from his work is an appreciation of American colonial and state precedents, the latter of which were far more important in influencing federal law than English examples.” P. HOFFER & N. HULL, *supra* note 11, at 268.

If we turn to contemporary interpretations of the Constitution, we find the matter still in doubt. There are at least two passages in *The Federalist* which suggest that the author contemplated removal before criminal prosecution, if he did not regard the order as a constitutional command.<sup>111</sup> The author was Alexander Hamilton. Although I would not join Professor Berger in dismissing Hamilton's views as those of a person whose "participation in the Convention was sporadic and had little, if any, influence,"<sup>112</sup> it is perhaps relevant that Hamilton's own plan provided that a president be removed and "be afterwards tried & punished."<sup>113</sup> In addition to Hamilton's views, which are ambiguous and may reflect the holding power of one's own ideas, we have the evidence from the state ratifying conventions, which has something for both sides of this debate.<sup>114</sup>

In such a state of affairs, it may be useful to consider both the logical and practical consequences of the argument. If a federal judge must be "convicted" and thus removed before he or she can be prosecuted, a judge who has been impeached but who is not, for whatever reason, convicted cannot be prosecuted. Rather than belittle an interpretation of the Constitution that would lead, in such a case, to "complete and . . . permanent immunity from criminal prosecution,"<sup>115</sup> I prefer to pose a ques-

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<sup>111</sup> The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

THE FEDERALIST NO. 65, *supra* note 42, at 20 (A. Hamilton); *see id.* No. 77, at 97.

<sup>112</sup> Berger, *supra* note 108, at 1127.

<sup>113</sup> 3 Farrand, *supra* note 34, at 625. Berger asserts that Hamilton's plan "was not considered by the Convention." Berger, *supra* note 108, at 1127. This may be misleading. Hamilton read to the delegates a sketch of his plan of government. *See* 1 Farrand, *supra* note 34, at 291-93. Moreover, "[a]lthough [his] plan was not formally before the Convention in any way, several of the delegates made copies." 3 *id.* at 617.

<sup>114</sup> *See* Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103, 104-05 n.10 (1986-87).

<sup>115</sup> Memorandum for the United States at 9-10, Application of Spiro T. Agnew, Civil No. 73-965 (D. Md.), *quoted in* Berger, *supra* note 108, at 1133. In arguing that "impeachment never immunizes the individual from criminal proceedings," Note, *supra* note 105, at 442, a recent commentator neglects differences between the purposes and reach of the impeachment process and the criminal process and thus neglects the possibility of immunity arising from the Senate's failure to convict.



tion. Is it possible that, in a provision designed to eliminate double jeopardy principles as a potential bar to the criminal prosecution (and punishment) of one convicted and removed through the impeachment process, the framers sought to bring, or inadvertently did bring, the same principles in through the back door, so as to protect one who has not been removed (“convicted”) from criminal prosecution?

Obviously, I intend the question as rhetorical, but the implications of the answer for other permutations in the order of precedence suggest the wisdom of elaboration. As noted above, the Constitution breaks from the English practice of making the impeachment process an all purpose affair, at the end of which the individual might lose not only his office but his head.<sup>116</sup> The arguments for distinguishing conduct that may be criminal from conduct warranting impeachment and removal are, at least for me, compelling.<sup>117</sup> These arguments are confirmed by the view of early and distinguished commentators that the impeachment process and the criminal process serve different purposes, albeit the jurisdictions sometimes overlap.<sup>118</sup> In such a scheme, principles of double jeopardy have no role to play.<sup>119</sup> Just as conduct need not be criminal to justify impeachment and removal, so the fact that conduct does not justify impeachment and removal does not mean that it is not criminal.<sup>120</sup> It is inconceivable to me, as it was to Justice Story, that the framers intended to bar the prosecution of one impeached but not convicted and thus

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<sup>116</sup> See, e.g., P. HOFFER & N. HULL, *supra* note 11, at 1-14; 2 J. STORY, *supra* note 37, §§ 780-83; W. RAWLE, *supra* note 37, at 206-07.

<sup>117</sup> See, e.g., C. BLACK, *IMPEACHMENT: A HANDBOOK* 25-41 (1974); Comm. on Fed. Legislation, *The Law of Presidential Impeachment*, 19 REC. A.B. CITY N.Y. 154, 155-58 (1974) [hereinafter *The Law of Impeachment*]. Professor Black supported (without elaborating) “the contention . . . that an *incumbent* president cannot be put on trial in the ordinary courts for ordinary crime.” C. BLACK, *supra*, at 40. *But see* Berger, *supra* note 108.

<sup>118</sup> See, e.g., THE FEDERALIST NO. 65 (A. Hamilton); W. RAWLE, *supra* note 37, at 198-208; 2 J. STORY, *supra* note 37, at §§ 744-45, 747-48, 759, 762-64, 780-84, 788, 794-95, 799, 810; 1 THE WORKS OF JAMES WILSON, *supra* note 34, at 324, 426.

<sup>119</sup> See, e.g., 2 J. STORY, *supra* note 37, at §§ 779-84. This is not to say, however, that such principles would be inapplicable to an attempted impeachment of a person previously tried by the Senate. See *id.* at § 806.

<sup>120</sup> See *supra* text accompanying note 117.



inconceivable that the Constitution should be read to require removal before prosecution.<sup>121</sup>

The second line of attack on criminal prosecution before removal is both narrower and broader than the first. It is narrower because, at least in discriminating hands, it distinguishes between prosecution and conviction, on the one hand, and imprisonment on the other.<sup>122</sup> It is broader because, of necessity, the argument must quickly depart the text of the Constitution. Such an argument, like the idea of equality, "[o]nce loosed . . . is not easily cabined."<sup>123</sup>

In whatever hands, the attack requires acceptance of the proposition that the constitutionally prescribed impeachment process is the exclusive means to remove a federal judge from office. As indicated above, I accept that proposition, finding it either asserted or assumed by early commentators and confirmed by the verdict of history.<sup>124</sup>

Even if one were persuaded that imprisonment, or imprisonment for a long period, was tantamount to removal and thus constitutionally proscribed, the conclusion would not follow that the criminal process is irrelevant in considering adjustments in current arrangements. If the constitutional problem inheres only in the sentence, it should be possible, with suitable amendments to Title 18,<sup>125</sup> to postpone the execution of a sentence of confinement until such time, if ever, as a convicted judge is im-

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<sup>121</sup> See 2 J. STORY *supra* note 37, at §§ 779-85. "But the ordinary tribunals . . . are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." W. RAWLE, *supra* note 37, at 204; see 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 477 (J. Elliot ed. 1836) (James Wilson opining to the Pennsylvania Convention that "[t]hough they may not be convicted on impeachment before the Senate, they may be tried by their country.").

<sup>122</sup> Although rejecting Judge Hastings' attempt to quash the indictment against him, the court of appeals did "not address whether or under what circumstances an extended sentence of imprisonment might approach in substance removal from office." *Hastings*, 681 F.2d at 712 n.19. See *United States v. Claiborne*, 790 F.2d 1355, 1356-58 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc); Note, *supra* note 105, at 425-26.

<sup>123</sup> Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966-67).

<sup>124</sup> See *supra* text accompanying notes 35-38, 108.

<sup>125</sup> See, e.g., 18 U.S.C. §§ 3551, 3553, 3561-64 (Supp. III 1985).

peached and removed.<sup>126</sup> As developed below, the record of the criminal trial could measurably diminish the burdens of the impeachment process,<sup>127</sup> and a legislative time limit on the duration of any postponement might serve as an additional incentive to Congress to proceed with dispatch. If Congress did not view the conduct undergirding the conviction as an impeachable offense, the judge could go free—as free as anyone who escapes confinement but not the rigors of the process that may lead to it—and prosecutors would know that not every confirmed peccadillo of a federal judge would result in an empty bench, even temporarily.

I am not, however, persuaded that imprisonment of a federal judge pursuant to a judgment of conviction, even for a long term, would constitute “removal from office” under an appropriate constitutional analysis. I support functional analysis just as it supports me,<sup>128</sup> and once the notion of “removal from office” is freed from its constitutional context, I admit that it is as hard to defend imprisonment of a federal judge as it is to defend the failure to reimburse an embattled federal judge for legal expenses against a claim of diminished compensation.<sup>129</sup> But what I have called the constitutional context is as clear for one as it is for the other. In the case of “removal from office,” the framers had in mind the formal termination of a commission or of tenure in office.<sup>130</sup> Yes, they were concerned about judicial

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<sup>126</sup> Cf. C. BLACK, *supra* note 117, at 40-41 (suggesting indictment and delay of trial of incumbent president on assumptions that latter may not be tried while holding office and that crime charged not an impeachable offense).

<sup>127</sup> See *infra* text accompanying notes 178-88, 230-32.

<sup>128</sup> See Hazard, Book Review, 87 YALE L.J. 1284, 1289 (1977-78).

<sup>129</sup> Cf. *Hastings*, 829 F.2d at 103 (finding lack of exhaustion of administrative remedies as to claim that failure to pay or to reimburse expenses incurred in proceedings under 1980 Act constituted diminution of compensation prohibited by art. III, § 1).

<sup>130</sup> See THE FEDERALIST NO. 65, *supra* note 42, at 20 (A. Hamilton); *id.* No. 77, at 97; *id.* No. 79, at 108-09; 2 Farrand, *supra* note 34, at 64-69; see also W. RAWLE, *supra* note 37, at 207 (“They [courts of law] can neither remove nor disqualify the person convicted, and therefore the obnoxious officer might be continued in power and the injury sustained by the nation be renewed or increased.”); *id.* at 208 (“A commission granted during good behavior can only be revoked by this mode of proceeding.”); 2 J. STORY, *supra* note 37, § 782, at 251 (“In England, the judgment upon impeachments is not confined to mere removal from office; but extends to the whole punishment attached by law to the offense.”); *id.* at § 784 (“In the ordinary course of the administration of criminal justice, no court is authorized to remove, or disqualify an offender, as a part

independence, and yes, the Constitution should be interpreted so as to accommodate situations unforeseen or unforeseeable in 1787.<sup>131</sup> But criminal proceedings were not a threat to judicial independence unknown to the framers, and, I have argued, they were not a threat the framers deemed serious enough to foreclose. I conclude, therefore, that a federal judge can be both prosecuted and imprisoned without prior resort to the impeachment process.

This does not mean that, as citizens, we should not be concerned about the threat that unrestrained prosecution of federal judges would pose to their independence. Over the long term, prosecutors seem to have entered the scene only in extreme cases,<sup>132</sup> although recently there have been charges of prosecutorial abuse.<sup>133</sup> In general, there are institutional considerations and safeguards that would tend to reign in zealous federal investigators and prosecutors<sup>134</sup> and numerous formal safeguards available to federal judges as "ordinary citizens."<sup>135</sup> Moreover, even if federal trial and appellate judges cannot always be counted on to see the forest of judicial independence for an unpopular tree,<sup>136</sup> that they would usually do so seems a fair assumption. I can think of no reason why an individual federal judge should have different (i.e., additional) defenses to an indictment, once returned, than does an ordinary citizen. Surely the Justice Department should not ignore the word of an informant that a federal judge is on the take; nor, in my view, should it rest content with civil remedies for the income tax evasion of a federal judge, as it might of a janitor. But these are matters for

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of its regular judgment. If it results at all, it results as a consequence, and not as a part of the sentence."); 1 THE WORKS OF JAMES WILSON, *supra* note 34, at 325-26.

<sup>131</sup> The framers did consider and reject one form of "temporary removal," but it too would have been a formal action, proposed in a motion "that persons impeached be suspended from their office until they be tried and acquitted." 2 Farrand, *supra* note 34, at 612.

<sup>132</sup> See *supra* text accompanying notes 57, 102-04.

<sup>133</sup> See, e.g., *United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1636 (1986); see also *infra* text accompanying notes 185-88.

<sup>134</sup> See Weingarten, *Judicial Misconduct: A View from the Department of Justice*, 76 Ky. L.J. 799, 804-05 (1987-88).

<sup>135</sup> *Claiborne*, 727 F.2d at 848.

<sup>136</sup> Cf. H.R. REP. NO. 1313, *supra* note 38, at 14 (means to prevent "one group of federal judges arbitrarily 'ganging up' [on] or 'hazing' another judge").

policymaking, and they may be a subject for congressional inquiry.

Neither of the institutional considerations mentioned above is fair ground for assumption in prosecutions under state law. That is a matter deserving of discrete historical inquiry<sup>137</sup> and constitutional analysis.

Let us assume that federal investigators and prosecutors pursue possible violations of federal criminal law by article III judges with circumspection and awareness of the potential costs of an erroneous exercise of prosecutorial discretion. In considering adjustments in current arrangements, the question becomes whether it is possible to enhance the usefulness of the criminal process without affording irrelevant incentives to the enforcement of criminal laws against federal judges.

I believe that it is possible to enhance the usefulness of the criminal process to the impeachment process by adopting rules or practices in the House, and perhaps in the Senate, that accord substantial preclusive effect to factual findings necessary to a criminal conviction once that conviction has been affirmed on appeal. The matter is best discussed, however, in connection with adjustments in the impeachment process and will be deferred to that point.<sup>138</sup>

I also believe that automatically according preclusive effect either to factual findings or to a conviction *per se* would introduce irrelevant incentives to the enforcement of criminal laws against federal judges and, for that and other reasons, should be avoided. Again, the matter is best discussed in the context in which decisions on it will be made, and it is to that context that I now turn.

### *E. The Impeachment Process*

Before discussing possible adjustments in the current arrangements for impeachment and trial, it is important to state and

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<sup>137</sup> Judge Manton's downfall came as a result of a state criminal investigation, although he was prosecuted by federal authorities. According to Joseph Borkin, "District Attorney [Thomas E.] Dewey . . . made it abundantly clear that if the Federal government would not act under Federal criminal statutes, he would proceed under state law." J. BORKIN, *supra* note 16, at 28.

<sup>138</sup> See *infra* text accompanying notes 178-84, 230-32.



briefly to defend a few premises or assumptions from which the discussion proceeds.

I assume, because I have been convinced, that most questions of substance arising in connection with an impeachment inquiry by the House or a trial on articles of impeachment by the Senate are not subject to judicial review. Again, the verdict of history weighs heavily.<sup>139</sup> Moreover, the arguments to the contrary<sup>140</sup> have been exhaustively, and in my view convincingly, refuted.<sup>141</sup> Only one set of arguments, based on relatively recent authority, deserves attention here.

Whatever one thinks of *Powell v. McCormack*,<sup>142</sup> it is hard to imagine a more “textually demonstrable constitutional commitment”<sup>143</sup> of the exclusive power to determine matters of substance than the Constitution’s commitment to the House of Representatives of “the sole Power of Impeachment,”<sup>144</sup> and to the Senate of “the sole Power to try all Impeachments.”<sup>145</sup> Moreover, the evidence of the framers’ intent to pretermitt the involvement of the courts in the process not only supports that conclusion;<sup>146</sup> it also supports the conclusion that on matters of substance the process requires decisions for which there is “a lack of judicially discoverable and manageable standards” and

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<sup>139</sup> Apparently the only attempt to secure judicial review of the impeachment process in our history was unsuccessful. *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937). Early commentators on the Constitution asserted or assumed that there was no judicial appeal from, or review of, the impeachment process. See W. RAWLE, *supra* note 37, at 208; 2 J. STORY, *supra* note 37, at §§ 764, 803.

<sup>140</sup> See, e.g., R. BERGER, *supra* note 35, 103-21.

<sup>141</sup> See, e.g., C. BLACK, *supra* note 117, at 53-63; Goldstein, *Memorandum III on the Effect of the End of a Congress and Start of a New Congress on a Pending Impeachment Proceeding: Judicial Review of These Questions*, in SENATE COMM. ON RULES AND ADMINISTRATION, 93D CONG., 2D SESS., IMPEACHMENT: MISCELLANEOUS DOCUMENTS 167-204 (Comm. Print 1974) [hereinafter IMPEACHMENT: MISCELLANEOUS DOCUMENTS]; *The Law of Impeachment*, *supra* note 117, at 167-70; Goldberg, *An Essay on Raoul Berger’s Thesis for Judicial Intervention in the Process of the Removal of the President of the United States*, 1975 WISCONSIN L. REV. 414.

<sup>142</sup> 395 U.S. 486 (1969).

<sup>143</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962); see *Powell*, 395 U.S. at 518-48.

<sup>144</sup> U.S. CONST. art. I, § 2.

<sup>145</sup> *Id.* at § 3.

<sup>146</sup> See THE FEDERALIST NO. 65 (A. Hamilton); 2 Farrand, *supra* note 34, at 500, 551; Eilberg, *The Investigation by the Committee on the Judiciary of the House of Representatives into the Charges of Impeachable Conduct Against Richard M. Nixon*, 48 TEMPLE L.Q. 209, 230-31 (1975).



some of which necessarily involve “an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>147</sup> Perhaps there could or should be judicial review of a decision to impeach or to remove a federal judge for conduct (or inaction) that was avowedly not considered “Treason, Bribery, or other high Crimes and Misdemeanors”<sup>148</sup> by the House or Senate, but that will presumably never occur.

As to matters of procedure, the question is more complicated. The Constitution’s textual commitment to each House of the discretion to “determine the Rules of its Proceedings,”<sup>149</sup> lacks the word “sole” and in that respect is similar to the companion provision that “[e]ach House shall be the Judge of the . . . Qualifications of its own Members,”<sup>150</sup> which was at issue in *Powell*. It has long been clear in other contexts that, when rules of Congress or of its committees are supported only by reference to this provision of the Constitution, such rules are “judicially cognizable,”<sup>151</sup> although judicial scrutiny (as opposed to construction) is limited to consistency with the Constitution and preservation of fundamental rights.<sup>152</sup>

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<sup>147</sup> *Baker*, 369 U.S. at 217; see *Powell*, 395 U.S. at 548-49.

The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security . . . The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

THE FEDERALIST NO. 65, *supra* note 42, at 19 (A. Hamilton); see W. RAWLE, *supra* note 37, at 201-03; 2 J. STORY, *supra* note 37, at §§ 743-73, 784; 1 THE WORKS OF JAMES WILSON, *supra* note 34, at 324.

<sup>148</sup> U.S. CONST. art. II, § 4. The same may be true of an attempt to extend a judgment beyond “removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States,” the limits stated *id.* at art. I, § 3, cl. 7.

In this discussion, I assume a federal court with subject matter jurisdiction. *But see* C. BLACK, *supra* note 117, at 55-61.

<sup>149</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>150</sup> *Id.* at cl. 1.

<sup>151</sup> *Yellin v. United States*, 374 U.S. 109, 114 (1963).

<sup>152</sup> See *United States v. Smith*, 286 U.S. 6, 33 (1932); *United States v. Ballin*, 144 U.S. 1, 5 (1892).

In the impeachment context, the Constitution contains a number of specific procedural requirements for a Senate trial, disregard of which perhaps should be reviewable by a federal court possessed of subject matter jurisdiction.<sup>153</sup> To complicate matters further, although early commentators on the impeachment process sometimes extended reasoning about the inappropriateness of judicially created standards to matters of procedure,<sup>154</sup> Justice Story at least was hopelessly inconsistent on that subject.<sup>155</sup>

If that were all, one might conclude that there is no constitutional or prudential barrier to judicial review of the procedures employed by the House and Senate in the impeachment process. It is not all, however, even passing the implications of the other elements of the political question doctrine for the resolution of the issue. Some have relied on the common sense view that “procedural decisions will inevitably be tied to judgments on the merits,”<sup>156</sup> that in other words even limited judicial control of procedure could vitiate exclusive congressional control of substance. I would add to that common sense view the formal argument that, apart from article I, section 5, the grants of the power to impeach and of the power to try impeachments include inherent powers to determine the rules for those respective proceedings, and that if the greater powers are exclusive, so are the lesser<sup>157</sup>—subject only to judicial review for consistency with specific procedural directives in the Constitution. As for Justice

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<sup>153</sup> See U.S. CONST. art. I, § 3, cl. 6 (senators on oath or affirmation; Chief Justice presides when President tried; conviction requires concurrence of two thirds of members present.).

<sup>154</sup> See W. RAWLE, *supra* note 37, at 201.

<sup>155</sup> Compare 2 J. STORY, *supra* note 37, at § 763 with *id.* at §§ 796-97.

<sup>156</sup> *The Law of Impeachment*, *supra* note 117, at 170.

<sup>157</sup> Ancillary to the sole power of impeachment vested in the House and the power to try impeachments vested in the Senate is the power to govern the timing and the extent of discovery that will be allowed. The doctrine of the separation of powers that denies a court the power to enjoin impeachment also denies a court the power to dictate how the impeachment proceedings shall be conducted. See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) at 501 (dictum).

*In Re Grand Jury Proceedings of Grand Jury No. 81-1* (Miami), 669 F. Supp. at 1078; cf. *Coleman v. Miller*, 307 U.S. 433, 456-60 (1939) (Black, J., concurring) (exclusive control over amendment process includes steps leading to determination that amendment has been adopted).

Story, we should recognize that he was not directly addressing the question that concerns us and that the source of his inconsistency was an argument pitched to another audience, in favor of his campaign for federal common law.<sup>158</sup>

I also assume that freedom from judicial review on most matters of substance and procedure in the impeachment process does not entail the freedom of members of Congress to ignore those parts (that is, most) of the Constitution that are not specifically addressed to the process.<sup>159</sup> I assume that, as conscientious legislators,<sup>160</sup> members of Congress will endeavor to define the applicability of constitutional requirements announced in other contexts to the impeachment process and that they will endeavor to ensure that their proceedings and decisions comport with the constitutional norms thus determined.

### 1. *Impeachment by the House of Representatives*

In 1980 testimony concerning legislative proposals in the field of federal judicial discipline, Representative Rodino recalled that, when the resolutions impeaching President Nixon were referred to the House Judiciary Committee, "we were forced to proceed with virtually no guideposts"<sup>161</sup> and that the Committee "created almost from whole cloth a procedure for conducting our inquiry and resolving each of the myriad problems we encountered."<sup>162</sup> In that regard, Rodino "recommend[ed] that we on the Judiciary Committee consider improvements in the way in which we handle

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<sup>158</sup> See 2 J. STORY, *supra* note 37, at §§ 796-97; Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1294-1300 (1984-85). Story's view that the common law "regulate[d], interpret[ed], and controll[ed] the powers and duties of the court of impeachment," 2 J. STORY, *supra* note 37, at § 796, was no more inconsistent with his belief that courts were "exempt[ed] . . . from all participation in, and control over," *id.* at § 764, the impeachment process, than is the view taken below that the House and Senate are bound by the Constitution, although their interpretations of its requirements are not subject to judicial review.

<sup>159</sup> See C. BLACK, *supra* note 117, at 23-24; Goldstein, *supra* note 141, at 187-89.

<sup>160</sup> See Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1974-75).

<sup>161</sup> *Judicial Tenure and Discipline 1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 127 (1980).

<sup>162</sup> *Id.* at 128.

complaints against judges” with a view toward “changes in the rules for the review and disposal of complaints.”<sup>163</sup>

In the House Report on the bill that, as amended, became the 1980 Act, the House Judiciary Committee stated that it had “acted to firm up its impeachment authority by referring all complaints against federal judges to a single subcommittee (the Subcommittee on Courts, Civil Liberties and the Administration of Justice).”<sup>164</sup> Moreover, the Committee expressed willingness “to improve its oversight over federal judges and . . . to consider improvements in the way that it handles complaints against judges.”<sup>165</sup>

The House Judiciary Committee, acting through the Subcommittee on Courts, Civil Liberties and the Administration of Justice, unquestionably has “improve[d] its oversight over federal judges.”<sup>166</sup> But, although impeachment proceedings are not without guideposts, in the form of a collection of precedents,<sup>167</sup> they are not in most respects governed by general rules.<sup>168</sup> It is true that in a changing political body like the House of Representatives,<sup>169</sup> rules cannot ever be a source of long-term expectations; indeed, even short-term expectations are subject to frustration by changes in the rules during a session. It is also true that in some respects every impeachment inquiry is *sui generis*, but it is not clear that the observation suffices as a normative defense of *ad hoc* procedure.

A number of problems exist with the House’s approach to impeachment inquiries. First, most of the precedents available

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<sup>163</sup> *Id.* at 129.

<sup>164</sup> H.R. REP. NO. 1313, *supra* note 38, at 5.

<sup>165</sup> *Id.* at 20.

<sup>166</sup> See *Oversight Hearing*, *supra* note 8; Burbank, *Politics and Progress*, *supra* note 62, at 14.

<sup>167</sup> See IMPEACHMENT, SELECTED MATERIALS ON PROCEDURE, *supra* note 45, at 57-72, 687-740, 765-71. In addition, rules have been adopted for the conduct of specific impeachment inquiries. See, e.g., Firmage & Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1109-10 (procedural rules for the Nixon impeachment inquiry).

<sup>168</sup> Presumably, however, an impeachment inquiry is subject to any applicable rules of the House and of the House Judiciary Committee. See, e.g., H.R.R. XI(2)(K) (investigative hearing procedures), reprinted in CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 279, 99th Cong., 2d Sess. 434-36 (1987) [hereinafter H.R. DOC. NO. 279].

<sup>169</sup> See *Gojack v. United States*, 384 U.S. 702, 707 n.4 (1966).

as “guideposts” are at least fifty years old, and the two of most recent vintage were indeed *sui generis* in consequential respects.<sup>170</sup> Second, even if that were not the case, and in a body whose membership is relatively transient, exclusive resort to precedents for procedural guidance would involve inefficient duplication of effort. Third, guideposts can point in different directions, providing opportunity for argument about the proper direction, and hence occasioning delay.<sup>171</sup>

Rules need not be inflexible, and if the label is important for political purposes, they need not even be called rules.<sup>172</sup> Whether, however, the preferred label is “rules,” “guidelines,” “standards,” or even “distillation of practice,” the need is for a body of general procedural directives available at the start of an impeachment inquiry and presumptively applicable to the conduct of that inquiry. The goal of the exercise would not be to create or to honor expectations, except perhaps the expectation that, as conscientious legislators, members of the House have given sustained thought to their constitutional responsibilities. The goal would be to prevent the rule of a graveyard on the one hand or of an immaculate conception on the other, as well as to reduce the costs, delays, and opportunities for tactical maneuvering inherent in a regime of procedural adhocery.<sup>173</sup>

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<sup>170</sup> I refer to the impeachment inquiries concerning former President Nixon and Judge Claiborne. The rules adopted for the Nixon inquiry, *see supra* note 167, may not be a good general model—indeed they may cause mischief—because of the special procedural solicitude shown for a president. The Claiborne inquiry, on the other hand, was circumscribed because of his criminal conviction. *See infra* text accompanying notes 178-94.

<sup>171</sup> *See supra* note 170.

<sup>172</sup> “Those who prefer discretion to rules on particular subjects are often victims of the widespread misimpression that rules are necessarily inconsistent with discretion; guiding rules and rules with escape clauses are not inconsistent with discretion.” 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 186 (2d ed. 1979) (emphasis in original).

<sup>173</sup> *Cf.* Burbank, *supra* note 7, at 324-25 (“skeletal rulemaking promotes inefficiency as well as uncertainty”).

In the context of impeachment, a member of the House could object that the adoption of general rules might invite judicial review. *Cf. Senate Rules, supra* note 21, at 27 (Senator Byrd questions whether specifying burden of persuasion in the Senate Rules would invite an attempt to secure judicial review). But it is unclear to me why general rules are different in that respect from rules adopted for a specific inquiry, *see supra* note 167, and as to both I do not believe judicial review is available. *See supra* text accompanying notes 149-58.



Although panic at the prospect of the impeachment process running its course has been most noticeable in the Senate, there is cleaning to be done in both Houses.

Subcommittees have a peculiar history in the House of Representatives.<sup>174</sup> It may therefore seem churlish, or at least naive, to note the recent departures from the House Judiciary Committee's effort "to firm up its impeachment authority by referring all complaints against federal judges to a single subcommittee (the Subcommittee on Courts, Civil Liberties and the Administration of Justice)."<sup>175</sup> Whatever the cause of those departures, one of them has elicited unwarranted and unfair speculation about the likely results of the current investigation of Judge Hastings.<sup>176</sup> More generally, considerations similar to those supporting the argument for rules or guidelines also support giving to one subcommittee the initial responsibility of conducting an impeachment investigation.<sup>177</sup>

Finally in connection with the House's role in the impeachment process, I return to the question of increasing the usefulness of criminal law enforcement without creating irrelevant incentives for law enforcement officials. In its report recommending the resolution impeaching Judge Claiborne, the House Judiciary Committee observed that "[t]here was no need for an independent finding of facts about Judge Claiborne's conduct by the Committee,"<sup>178</sup> because they had "already been found under a judicial procedure which afforded the respondent full

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<sup>174</sup> See THE RALPH NADER CONGRESS PROJECT, THE JUDICIARY COMMITTEES 32-57, 367-83 (1975).

<sup>175</sup> H.R. REP. NO. 1313, *supra* note 38, at 5. The Hastings inquiry was referred to the Subcommittee on Criminal Justice. See Marcus, *Congress Reluctantly Takes up Hastings' Ouster*, Legal Times, March 30, 1987, at 2. The Nixon inquiry was referred to the Subcommittee on Civil and Constitutional Rights. See *supra* note 4.

<sup>176</sup> A number of people with whom I have discussed the Hastings inquiry assume that he will not be impeached because the Chair of the Subcommittee, Representative Conyers, is, like Judge Hastings, a black. It is sad that, with Judge Hastings leveling charges of racism at the likes of Judge Frank Johnson and John Doar, see, e.g., Taylor, *Top Panel Urges Congress to Weigh Ousting of Judge*, N.Y. Times, March 18, 1987, at A1, some interested observers thereby convict themselves of that charge. See Marcus, *supra* note 175, at 2.

<sup>177</sup> See *supra* text accompanying notes 167-73. Workload is, however, a weighty countervailing consideration. See Greenhouse, *Judicial Impeachment: Its Process Antiquated?*, N.Y. Times, May 11, 1988, at A22.

<sup>178</sup> H.R. REP. NO. 688, 99th Cong., 2d Sess. 24 (1986).

due process rights.”<sup>179</sup> The Committee noted, however, that it had “nonetheless through the hearing process and subsequent deliberations, examined the facts and circumstances supporting the jury verdict and conviction of Judge Claiborne.”<sup>180</sup> In sum,

[a]fter completing its factual examination, the Committee concluded that, where a complete and final record of adjudicated proceedings leading to a guilty verdict is before it, the Committee is justified in taking action analogous to the concept of “judicial notice,” but in a legislative setting. That is, the factual findings have already been made by a unanimous jury beyond a reasonable doubt.<sup>181</sup>

In my view, the Committee was on the right track, although I do not find the suggested analogy of “judicial notice” as helpful as that of issue preclusion.<sup>182</sup> More important, at the time of the Committee’s inquiry, Judge Claiborne had exhausted all avenues of direct appeal, but his collateral attack on the conviction was still pending.<sup>183</sup> In the absence of affirmance on appeal—such a case may never arise—I doubt that it would be appropriate even for the House to accord preclusive effect to the factual findings necessarily implicit in a guilty verdict. At least it would not seem appropriate if an appeal were pending that included claims of error casting doubt on the evidentiary foundation of the verdict or on the integrity of the fact-finding process. In addition, when a collateral attack on a conviction is pending, it may be that the House should consider whether success in that effort would cast doubt on the factual predicate for its deliberations. Finally, in either event, attention should be given to the question, if and when it ever arises, whether the House should consider claims

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See *Hearing on S.J. Res. 364 & S.J. Res. 370*, *supra* note 5, at 34 (statement of Stephen B. Burbank); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Although the pendency of an appeal would not deprive a judgment of finality for purposes of issue preclusion under the Restatement, see *id.* at § 13 comment f, I argue below for a different rule in this context. Note, however, the suggestion that “[i]t may be appropriate to postpone decision of [the] question [of preclusion] until the proceedings addressed to the judgment are concluded.” *Id.*

<sup>183</sup> See H.R. REP. NO. 688, *supra* note 178, at 19-20.

of error implicating the trier's fact-finding that were not made in judicial proceedings.<sup>184</sup>

In this only modestly revised account of the appropriate procedure for the conduct of an impeachment inquiry in the case of a convicted felon, I have sought to be careful in describing both those claims of error that, in my view, might justify the failure to accord preclusive effect to the judgment of conviction and the circumstances in which that might be appropriate. In the Claiborne inquiry, the subcommittee to which the resolution of impeachment was referred originally limited the scope of its inquiry.<sup>185</sup> Ultimately, Judge Claiborne's counsel was permitted "to present arguments outside the scope," and he "discussed the entire chain of events that preceded Judge Claiborne's first trial."<sup>186</sup> Because the matter was one "of first impression for the Committee on the Judiciary,"<sup>187</sup> and particularly in light of the suggested qualifications to the Committee's stated conclusions developed above, how can one cavil at the subcommittee's decision? The appearance of fairness is in the eye of the beholder, and in any event, the incremental costs of achieving it in a House inquiry that is otherwise suitably circumscribed may seem trivial. Perhaps, but the notion of "costs" also may vary with the observer. The costs of permitting a convicted felon to raise claims of error that have nothing to do with the facts or the fact-finding process may one day include letting the judge remain in office because the constable blundered. Even on the unlikely assumption that the Senate is bound to dismiss or that it should dismiss articles of impeachment because of conduct of law enforcement officials that does not implicate the fact-finding process,<sup>188</sup> in my view evidence of such conduct is irrelevant in the House's deliberations.

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<sup>184</sup> The use of rules of issue preclusion by analogy would suggest an affirmative answer to this question. See RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 182, at § 27 comment e.

<sup>185</sup> H.R. REP. NO. 688, *supra* note 178, at 4.

<sup>186</sup> *Id.* at 5.

<sup>187</sup> *Id.* at 24.

<sup>188</sup> The Senate Impeachment Trial Committee, see *infra* text accompanying notes 202-10,

granted, to a substantial extent, a motion by the House to exclude, as irrelevant, evidence of alleged judicial and prosecutorial misconduct . . . .

Although, I have argued, the House Judiciary Committee was on the right track in according preclusive effect to the findings of fact necessarily implicit in the jury's verdict convicting Judge Claiborne, it seemingly lost its way in formulating the third article of impeachment. According to that article, the facts that Judge Claiborne was found guilty of the crime of making and subscribing a false income tax return and, following judgment of conviction entered on the verdict, was sentenced to imprisonment and a fine were sufficient grounds for a conclusion that he was "guilty of misbehavior and . . . of high crimes."<sup>189</sup>

The problem with the third article in the Claiborne matter is not only that it may suggest no role for the House (or the Senate) in examining the factual underpinnings of a criminal conviction. The article, as explained in the Committee's report, reflects the view that conviction of a felony is an impeachable offense.<sup>190</sup> That view, if accepted, would constitute a self-inflicted wound, depriving our elected representatives of the duty and hence opportunity to exercise judgment on the extent of overlap between the prohibitions of a temporary majority and the prohibitions of a supra-majority, between sins against the commonwealth and those against the common weal. If accepted, the premise of the third article would also constitute an irrelevant

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In that ruling the Committee decided to permit, and the Committee subsequently did hear, testimony relating to Judge Claiborne's allegation that government agents had influenced the testimony of witnesses.

S. REP. NO. 511, 99th Cong., 2d Sess. 2 (1986). Although the full Senate voted not to hear additional witnesses, 132 CONG. REC. S15,557 (daily ed. Oct. 8, 1986), the alleged misconduct played a large part in the arguments presented to that body by Judge Claiborne and his counsel. *See id.* at S15,485-87, S15,496-503 (daily ed. Oct. 7, 1986) (statement of Mr. Goodman); *id.* at S15,503-05 (statement of Judge Claiborne). In fact, because the arguments preceded the vote, they may have made it closer than it might otherwise have been. *See infra* note 208. In any event, many senators were troubled by Judge Claiborne's allegations. *See, e.g.,* PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, S. DOC. NO. 48, 99th Cong., 2d Sess. 303 (1986) [hereinafter CLAIBORNE IMPEACHMENT TRIAL] (statement of Sen. Bingaman); *id.* at 316-17 (statement of Sen. Pryor); *id.* at 317 (statement of Sen. Heflin); *id.* at 339 (statement of Sen. McConnell); *id.* at 365 (statement of Sen. Levin); *id.* at 371 (statement of Sen. Gore).

<sup>189</sup> 132 CONG. REC. H4711 (daily ed. July 22, 1986).

<sup>190</sup> *See* H.R. REP. NO. 688, *supra* note 178, at 22-23. Another problem with the third article, which I do not pursue, is its reference to "misbehavior," as if "good behavior" were anything more than a definition of tenure.



incentive to the enforcement of criminal laws against federal judges, tempting federal (and state?) law enforcement officials to inquire whether the unpopular, eccentric, or otherwise suspicious federal judge had perhaps ever poisoned her neighbor's cat.<sup>191</sup>

In both respects, the third article of impeachment in the Claiborne matter shares defects of proposed constitutional amendments that matter also has inspired.<sup>192</sup> Happily, just as the Senate failed to convict on the third article,<sup>193</sup> it has not pursued the proposed amendments beyond hearings at which they were roundly (and squarely) criticized.<sup>194</sup>

## 2. *Trial in the Senate*

One need not be a cynic to understand why the prospect of a trial on articles of impeachment is a source of consternation in the Senate, at least when the individual impeached is the judge of an inferior federal court.<sup>195</sup> The Senate's legislative business is so demanding, by reason of both volume and importance, that any trial, particularly a protracted trial, before that body may seem a luxury we can no longer afford.<sup>196</sup> That in any event is the view animating some of the recently proposed constitutional amendments.

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<sup>191</sup> Certainly, it is not envisaged that there should be automatic removal of an Article III judge for something less than commission of a serious crime. Yet, how can one be sure that all federal, and particularly all state felonies fall within that class. For example, can it be said that the conviction of any one of the following felonies is so serious that a sitting Article III judge should *automatically* lose his or her office: destruction of a mailbox, 18 U.S.C. § 1705; mailing of a firearm declared nonmailable by statute, 18 U.S.C. § 1715; poisoning of an animal owned by another, Idaho Code § 18-2101(19); or adultery, *id.* § 18-6601.

*Hearing on S.J. Res. 364 & S.J. Res. 370, supra* note 5, at 17 (statement of Hon. J. Clifford Wallace); *see id.* at 35, 43 (statement of Stephen B. Burbank).

<sup>192</sup> *See supra* text accompanying notes 5, 191.

<sup>193</sup> 132 CONG. REC. S15,761 (daily ed. Oct. 9, 1986).

<sup>194</sup> *See Hearing on S.J. Res. 364 & S.J. Res. 370, supra* note 5.

<sup>195</sup> "[O]f [Judge Weinstein] one can say, after Justice Jackson: 'He is not non-final because he is inferior, but he is inferior only because he is non-final.'" Burbank, *The Chancellor's Boot*, 54 BROOKLYN L. REV. \_\_\_\_, \_\_\_\_ (1988) (footnote omitted) (forthcoming).

<sup>196</sup> *See supra* text accompanying note 69; McConnell, *Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change*, 76 KY. L.J. 739 (1987-88).



Unfortunately, the Senate seems never seriously to have considered adjustments in its own arrangements and only dimly to perceive that other arrangements might obviate the need to resort to the last line of defense against judicial misbehavior. I hope to have clarified the latter perception. It remains to address possible revisions in the final act.

Unlike the House, the Senate does have a set of general rules applicable to trials on articles of impeachment. But these rules have changed very little during the last one hundred and twenty years. One consequential amendment, authorizing the taking of evidence by a committee of less than the whole, was advocated at least thirty years before it was accepted. Once accepted, it was not availed of when an opportunity arose within a year, although it was employed, as amended, at the next opportunity—fifty years later. Revision of the Senate's rules has been a child of the moment, and the moment seems usually to have been the eve of trial, with the result that the project aborted or the gestation period was too short to permit full development. Most recently, the Senate simply adopted.<sup>197</sup>

It is not my purpose in this Essay to review the Senate's rules in detail. The existing literature, most of it dating from the mid-1970s, identifies the issues to be addressed, whether or not one agrees with the authors' analyses or policy preferences.<sup>198</sup> In addition, although the Senate Rules Committee circumscribed the scope of its reconsideration of the rules in 1974, the hearings that informed its modest recommendations (not adopted until 1986) are a valuable resource.<sup>199</sup> Valuable too are papers commissioned in anticipation of a trial on articles impeaching President Nixon that treat issues of concern in any revision.<sup>200</sup> Finally, a fresh look at revising the Senate's rules should consider how the rules have operated in practice and what has been the practice

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<sup>197</sup> See S. Res. 481, 99th Cong., 2d Sess. (1986); *supra* text accompanying notes 21-28.

<sup>198</sup> See, e.g., Firmage & Mangrum, *supra* note 167; Futterman, *supra* note 21; Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. REV. 512 (1975).

<sup>199</sup> See *Senate Rules*, *supra* note 21.

<sup>200</sup> See IMPEACHMENT: MISCELLANEOUS DOCUMENTS, *supra* note 141, at 167-204.

in the absence of rules. The Senate too has precedents<sup>201</sup> but only one in the last fifty years and it unique in the history of Senate trials.

For my limited purpose the contemporaneity rather than the uniqueness of the trial of Judge Claiborne would probably be determinative. No matter, for what was unique in that trial may have to become the norm if Senators are to be persuaded (assuming they should be persuaded) not to flee the field.

Added in 1935 and revised in 1986,<sup>202</sup> Rule XI provides for the appointment by the presiding officer, "if the Senate so orders," of a committee of senators "to receive evidence and to take testimony."<sup>203</sup> Subject to contrary order by the Senate, a committee thus appointed functions as the Senate would, with the same powers and under the same rules, in gathering evidence.<sup>204</sup> When considering the transcript of a committee's proceedings, however, the Senate retains the right to (re)consider questions of admissibility of evidence, as well as the rights to hear the testimony of any witness "in open Senate" and, indeed, to have "the entire trial in open Senate."<sup>205</sup> Moreover, the Senate does not receive any recommendations from a committee appointed under Rule XI, and it is therefore wholly unconstrained, as well as unguided, by the referral in determining the probative value of evidence that it deems admissible.<sup>206</sup>

Some commentators<sup>207</sup> and legislators,<sup>208</sup> and even a federal

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<sup>201</sup> See, e.g., IMPEACHMENT, SELECTED MATERIALS ON PROCEDURE, *supra* note 45, at 73-685, 773-850.

<sup>202</sup> The revisions were precisely those recommended in 1974. See *supra* text accompanying notes 22, 28.

<sup>203</sup> RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS XI, 132 CONG. REC. S11,902 (daily ed. Aug. 15, 1986).

<sup>204</sup> See *id.*

<sup>205</sup> *Id.*

<sup>206</sup> See *id.*; Goldstein, *Memorandum II on the Effect of the End of a Congress and Start of a New Congress on a Pending Impeachment Proceeding: The Senate Trial*, in IMPEACHMENT: MISCELLANEOUS DOCUMENTS, *supra* note 141, at 156-60.

<sup>207</sup> See, e.g., *No Time for Shortcuts*, Nat'l L.J. Oct. 20, 1986, at 12, col. 1.

<sup>208</sup> See, e.g., Heflin, *In Wake of Claiborne Trial—Who Should Judge the Judges?*, Legal Times, Dec. 15, 1986, at 13 [hereinafter Heflin, *In Wake of Claiborne Trial*], reprinted in 133 CONG. REC. S4990-91 (daily ed. Apr. 9, 1987); Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 JUDICATURE 123, 123-24 (1987) [hereinafter

judge,<sup>209</sup> have criticized the use of a committee to take evidence at the Claiborne trial, and some doubt that the procedure is constitutional.<sup>210</sup> Doubts on that score can only skew the consideration of alternatives to current arrangements, and they should therefore be settled—to the extent such questions are ever settled—as soon as possible.

Those whose doubts spring from the language of the Constitution, and in particular references to “the Senate,”<sup>211</sup> should consider that the Constitution’s grant of original jurisdiction to “the supreme Court”<sup>212</sup> has not been thought to foreclose the delegation of even more extensive powers to one not a member of that body.<sup>213</sup> They should also hesitate before attempting distinctions based on familiar labels, each of which seems to fall off the impeachment process as soon as it is applied.<sup>214</sup>

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Heflin, *The Impeachment Process*]. “This delegation of authority by the Senate was not without its critics. In fact almost a third of the Senate voted to take testimony on the Senate floor.” 132 CONG. REC. S16,788 (daily ed. Oct. 16, 1986) (statement of Sen. Dole). See *id.* at S15,762-73 (statement of Sen. Bingaman); *infra* note 210.

<sup>209</sup> In denying Judge Claiborne’s motion for a temporary restraining order against the Senate, after it had voted not to hear additional witnesses, see *supra* note 208, *infra* note 210, Judge Harold Greene observed:

It is unfortunate in a way that evidence on impeachment was taken through a committee for the first time, apparently, in the history of the republic. . . .

But the question is not whether I, or any other judge, would have organized the impeachment process and impeachment procedure the way it was organized in this instance this month, but the question is whether this court has the authority to interfere with the choice made by the Senate. In my judgment, the answer is clearly no.

Claiborne v. United States Senate, No. 86-2780 (D.D.C. Oct. 8, 1986) (transcript of proceedings), *printed in* CLAIBORNE IMPEACHMENT TRIAL, *supra* note 188, at 190-91; see Roberts, *Claiborne Ousted from U.S. Bench After Senate Vote*, Los Angeles Daily J., Oct. 10, 1986, at 1, col. 6.

<sup>210</sup> See, e.g., R. BERGER, *supra* note 35, at 169-73; C. BLACK, *supra* note 117, at 12 (“of dubious constitutionality”); cf. Heflin, *The Impeachment Process*, *supra* note 208, at 124 (questioning whether Senate proceedings in Claiborne trial “were in accordance with the due process clause of the Fifth Amendment”). Judge Claiborne moved to declare Senate Rule XI unconstitutional and for a trial before the entire Senate. 132 CONG. REC. S15,485 (daily ed. Oct. 7, 1986). Those motions were effectively denied when the Senate passed, by a vote of 61-32, Senator Dole’s motion that additional witnesses not be heard. 132 CONG. REC. S15,557 (daily ed. Oct. 8, 1986).

<sup>211</sup> U.S. CONST. art. I, § 3, *quoted supra* note 1; see C. BLACK, *supra* note 117, at 12.

<sup>212</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>213</sup> See Williams, *supra* note 198, at 578-80.

<sup>214</sup> See Goldstein, *supra* note 206, at 81-101; Williams, *supra* note 198, at 574-78, 582-86.

Those whose doubts are reinforced by suppositions as to the intent of the framers—who, after all, contemplated a smaller Senate and lived in less complicated if not less interesting times—should simply reconsider. English practice permitted the use of committees by the House of Lords (in a process to which the “criminal” label might stick),<sup>215</sup> and Jefferson specifically referred to that practice in the manual he prepared as President of the Senate between 1797 and 1801.<sup>216</sup>

But again, this is not a question that requires extensive original investigation. Having benefited from the thorough analyses of others, I harbor no serious doubts about the constitutionality of the Senate’s use of a committee in the Claiborne matter. Those who do should read the existing literature<sup>217</sup> and demonstrate the respects, if any, in which it is wanting. In the process, they may also want to address arguments to the effect that the Senate could constitutionally, and perhaps should in some cases, go further than Rule XI presently permits, as by using masters and/or authorizing its delegate(s) to make recommendations that would assist Senators in resolving questions of credibility.<sup>218</sup>

Simply as a matter of policy, I would not advocate the Senate’s use of a committee “to receive evidence and to take testimony” in a trial on articles impeaching a president, a vice-

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<sup>215</sup> See *supra* text accompanying notes 110, 116.

<sup>216</sup> See H.R. Doc. No. 279, *supra* note 168, at 299. In arguing against the use of masters by the Senate, as proposed by Professor Stolz (Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659, 660, 664 (1969)), Professor Berger invokes one part of Jefferson’s Manual, see R. BERGER, *supra* note 35, at 171-72, but, incredibly, does not mention the reference to committees. See Goldstein, *supra* note 206, at 153.

Doubters should also consider the limited powers of a committee appointed under Rule XI, see *supra* text accompanying notes 203-06, and the march of technology. The taking of evidence by the Senate Committee in the Claiborne matter was videotaped. See 132 CONG. REC. S15,487 (daily ed. Oct. 7, 1986) (statement of Manager Hughes).

<sup>217</sup> See, e.g., Williams, *supra* note 198; see also Memorandum of Defendants in Opposition to Application for a Temporary Restraining Order, Claiborne v. United States Senate, No. 86-2780 (D.D.C. 1986), printed in CLAIBORNE IMPEACHMENT TRIAL, *supra* note 188, at 223-55; 132 CONG. REC. S16,350-53 (daily ed. Oct. 15, 1986) (statement of Sen. Mathias).

<sup>218</sup> See, e.g., Stolz, *supra* note 216; Williams, *supra* note 198; see also *infra* note 219.



president, or a justice of the Supreme Court.<sup>219</sup> Moreover, although a 1986 amendment to Rule XI permits a committee of any size (including, I suppose, one),<sup>220</sup> I would not advocate reducing the size below twelve when the Senate will find facts as an original proposition. That is not because of any mystical attachment to a number associated with a jury, although the analogy may explain the reference in the rule as added in 1935. On the contrary, recognizing that the impeachment process is peculiarly a political process, my policy preference springs from the view that senators considering the transcript of proceedings before a committee should have some assurance that decisions as to the conduct of those proceedings were made by a group large enough to approximate differences in the Senate as a whole.<sup>221</sup> Obviously, this consideration would loom even larger if the Senate were to empower committees appointed under Rule XI to make recommendations, whether as to the facts that should be found or, in addition, the conclusions that should be drawn from them.<sup>222</sup>

That the Senate did end up finding the facts in the Claiborne trial as an original proposition came about, as it were, by default. In authorizing the appointment of a committee under Rule XI, the Senate had directed that all evidence be gathered before the Senate convened as a whole.<sup>223</sup> Before the Committee, the House managers moved that the Senate grant summary

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<sup>219</sup> Senator Hoar's 1904 proposal excluded the President, Vice-President, and any person acting as president. 38 CONG. REC. 3992 (1904). A similar proposal by Senator (later Justice) Sutherland during the impeachment trial of Judge Archbald would have excepted the impeachment trials of "the President or Vice-President of the United States, a member of the Cabinet, or a member of the Supreme Court of the United States." 49 CONG. REC. 698 (1912). This proposal would have permitted the Judiciary Committee to take testimony and to make advisory findings of fact. *See id.*; *cf.* Goldstein, *supra* note 206, at 156 ("[T]he Senate trial envisioned for a presidential impeachment by Hamilton in Federalist 65 would not be consistent with extensive use of masters.").

<sup>220</sup> 132 CONG. REC. S11,902 (daily ed. Aug. 15, 1986); *see supra* note 202.

<sup>221</sup> *Cf.* Sperlich, ". . . And Then There Were Six: The Decline of the American Jury," 63 JUDICATURE 262 (1980) (criticizing Supreme Court decisions regarding jury size and unanimity for ignoring or misusing empirical evidence regarding such matters as the effect of size on group performance, group productivity, and representativeness).

<sup>222</sup> This would require amending Rule XI. *See supra* text accompanying note 206.

<sup>223</sup> *See* S. Res. 481, 99th Cong., 2d Sess. (1986); 132 CONG. REC. S11,673 (daily ed. Aug. 14, 1986).



disposition of article III,<sup>224</sup> that the Senate apply collateral estoppel to articles I and II,<sup>225</sup> and that the Senate convene to consider those motions before they became moot as a result of the committee's proceedings.<sup>226</sup> After the committee had met in closed session, the chair denied the last of these motions, invoking his views on the merits as reason not to "disturb[] the Senate's careful decision that this committee receive the parties' evidence prior to the Senate's consideration of the legal and factual merits of the articles."<sup>227</sup> Because the committee lacked the power to dispose of an article of impeachment or to make findings of fact, the first two motions were probably doomed before the Senate.<sup>228</sup>

For the future, the Senate as a whole should address and make provision in its rules for at least some of the questions that arose in the Claiborne trial but that existing limitations on the powers of a committee appointed under Rule XI and an interpretation of the specific charge to the Claiborne committee kept from full ventilation. Anticipating that discussion, I would urge that summary disposition of an impeachment article is never appropriate for the reasons advanced above in my discussion of article III as approved by the House.<sup>229</sup> As I have also indicated, there is much to be said for granting substantial preclusive effect to the findings of fact necessarily grounding a guilty verdict, at least when the judgment of conviction has been affirmed on appeal and so long as those involved in the impeachment process

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<sup>224</sup> See REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE, *supra* note 72, at 43, 44.

<sup>225</sup> See *id.* at 43, 51-53.

<sup>226</sup> See *id.* at 43-44.

<sup>227</sup> *Id.* at 109.

<sup>228</sup> See *id.* at 44; S. REP. NO. 511, *supra* note 188, at 2. This was the view of the House managers, but the problem was not precisely one of mootness. Rather, once a committee of 12 Senators had taken evidence, it was unlikely that the Senate as a whole would choose to ignore the product of its efforts, although it retained the right to do so. See REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE, *supra* note 72, at 108. In any event, the House withdrew its motions before the full Senate. 132 CONG. REC. S15,279 (daily ed. Oct. 6, 1986) (remarks of Sen. Simpson). The Senate ultimately failed to convict on article III. See *supra* text accompanying note 193.

<sup>229</sup> See *supra* text accompanying notes 189-94. The Senate's failure to convict on article III probably serves as a sufficiently clear precedent to obviate the need for a rule on this issue. See *supra* text accompanying note 193. I am, of course, assuming a contested article of impeachment.

consider claims of error regarding the antecedent fact-finding process that have not previously been rejected by the courts.<sup>230</sup>

Perhaps, however, one should distinguish for these purposes between the role of the House and the role of the Senate. Some measure of efficiency can be achieved in the Senate process by admitting evidence previously admitted in the criminal proceedings.<sup>231</sup> Efficiency is not, in any event, the most important value. At the same time, it is not clear how according preclusive effect to fact-finding in the circumstances described could plausibly be deemed unfair or inconsistent with the exercise by the Senate of its unique constitutional duty, which in these circumstances would seem to have less to do with fact-finding than with the characterization of the facts under the constitutionally prescribed substantive standard.<sup>232</sup>

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<sup>230</sup> See *supra* text accompanying notes 178-88; see also *supra* note 228 and accompanying text.

<sup>231</sup> See REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE, *supra* note 72, at 110-11 (granting House motions to admit trial testimony and exhibits and to accept prior admissions); S. REP. NO. 511, *supra* note 188, at 2.

<sup>232</sup> Senator Mathias' argument to the contrary should be evaluated with the knowledge that he was addressing not only the House's motion to give preclusive effect to facts found in Judge Claiborne's criminal trial but also the motion to grant summary disposition to article III. See REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE, *supra* note 72, at 109-10; *supra* text accompanying notes 222-27. As to the latter motion, I agree with the Senator. See *supra* text accompanying note 229. As to preclusion, however, I am not persuaded by invocation of Hamilton's reference to "the double security intended them by a double trial." THE FEDERALIST NO. 65, *supra* note 42, at 20. Hamilton was there justifying the framers' choice of the Senate instead of the Supreme Court to try impeachments, and he assumed (if he did not assume that the Constitution required, see *supra* text accompanying note 111) that the impeachment trial would be held first. Moreover, he assumed that a Supreme Court justice would preside at the subsequent (criminal) trial and, were the constitutional arrangements otherwise, might infect a jury with his or her bias conceived from presiding at the impeachment trial. See 2 Farrand, *supra* note 34, at 500. Whatever the force of this reasoning on Hamilton's assumptions, it hardly seems applicable to the question under discussion.

Senator McConnell has offered some additional, quite practical, arguments in favor of the course taken in the Claiborne trial, including concern about the possibility that the criminal conviction might have been reversed and about the creation of a precedent that "could estop the Senate from [removing] an official for improprieties on which he had been acquitted for narrow technical reasons." McConnell, *supra* note 196, at 748. I have addressed the first concern. See *supra* text accompanying notes 182-84. The second is a red herring. As noted above, it is important to distinguish between the facts necessarily found (or issues necessarily determined) in the criminal proceeding and the result of that proceeding. It is also important to identify the purposes of the respective proceedings and the allocation and quantum of the burden of persuasion. Cf. RESTATEMENT (SECOND) OF

The experience of the committee appointed in the Claiborne trial revealed other respects in which the existing rules, whatever their suitability for trials "in open Senate," are ill adapted to a smaller group. A number of those rules are instinct with the limitations of proceedings before the full Senate.<sup>233</sup> Some of them were honored more in the breach than the observance by the Claiborne committee.<sup>234</sup> A fresh look at the Senate's rules should include discrete attention to a subset of rules applicable in, and only in, proceedings before a committee of less than the whole.

The transcript of the proceedings of the Claiborne committee tends to confirm, on the other hand, the Senate's wisdom in refusing thus far to adopt detailed rules of evidence for impeachment trials. Moreover, it suggests that, in revising the rules, the Senate should avoid the temptation of borrowing wholesale the Federal Rules of Evidence.<sup>235</sup> Even in the absence of a formally applicable body of evidence rules, the participants in the Clai-

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JUDGMENTS, *supra* note 182, at § 85 and comment g ("Effect of Criminal Judgment in Subsequent Civil Proceeding").

<sup>233</sup> See, e.g., Senate Rule XVI (requiring motions, objections, requests, or applications by parties or counsel to be addressed to presiding officer and empowering the latter or any senator to require that they be committed to writing); Senate Rule XIX (senator's questions and motions must be reduced to writing and put by presiding officer, and senators may not engage in colloquy).

<sup>234</sup> See, e.g., REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE, *supra* note 72, at 46 (question by Sen. Hatch), 643-45 (questions by Sen. Heflin). Perhaps because the chairman's reminder of the restrictions imposed by Rule XIX, *see id.* at 482, had not been successful, the Senate granted the chairman authority to waive its requirement that questions be put in writing and to establish terms and restrictions for questioning. 132 CONG. REC. S12,779 (daily ed. Sept. 17, 1986). But Senators continued to ask questions without first being recognized, *see, e.g.,* REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE, *supra* note 72, at 847 (Sen. Heflin); colloquy was not uncommon, *see id.* at 779-80, 873-78, and it is not clear that Rule XIX's requirement that motions be put in writing was ever observed. *See, e.g., id.* at 779 (Sen. Warner & Sen. Rudman), 916 (Sen. Warner), 956-57 (Sen. Heflin), 963 (Sen. Bingaman), 1087-88 (Sen. Heflin).

Notwithstanding the restricted role of the Senate Impeachment Trial Committee, *see id.* at 29, 109, some members commented at length on the credibility of a witness. *See id.* at 1104-05 (statements of Sen. Rudman, Sen. DeConcini, & Sen. Gore).

<sup>235</sup> Compare REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE, *supra* note 72, at 20 (Sen. Hatch recommends following the Federal Rules of Evidence) with *id.* at 21 (Sen. Gore argues that the Committee should not be bound by the Federal Rules of Evidence). Senator Hatch and Senator Gore agreed that the Committee could do what it wished in this regard, and the matter was not specifically resolved.

borne proceeding were alert to evidentiary questions.<sup>236</sup> It is not hard to imagine a trial governed by a detailed body of rules becoming bogged down in technical disputes, with the ascertainment of facts the victim. Particularly when one imagines a trial “in open Senate,” the dangers of distraction are daunting.

The Senate appears always to have followed rules of evidence in impeachment trials,<sup>237</sup> and it should continue to follow those that are deemed fundamental. To the extent that opinions differ about what are the fundamental rules today, to provide guidance to those preparing for trial, and to avoid disputes at trial, it would be sensible to formulate a few broad and general rules.<sup>238</sup> The sources mentioned previously discuss these matters in considerable detail,<sup>239</sup> and I will add only a few words.

Relevance remains the cornerstone of modern evidence law,<sup>240</sup> and it is an imperative for impeachment trials as much as for any other trial. Hearsay, if by that word we intend the elaborate and largely irrational system accreted over two centuries of distrust for juries,<sup>241</sup> is not a cornerstone of anything except the incomes of law professors. Trustworthiness and necessity should be the dominant considerations in the Senate’s decision whether to admit relevant evidence that is hearsay according to whatever test is accepted.<sup>242</sup> According to this view, the fact that evidence would be admissible under a long-recognized exception to the hearsay rule would not be determinative, as it apparently now

<sup>236</sup> See, e.g., *id.* at 70-74, 110-11, 536-37, 539-41, 544, 547, 560, 565-66, 568-69, 574-75, 577, 580, 595, 597-98, 607, 609-12, 616-17, 657, 659, 660, 664-65, 667, 671, 676, 676-77, 680-81, 692-93, 696-97, 755, 759, 773, 776, 826-29, 840, 847, 848, 862, 884-85, 905-06, 912, 916-17, 929, 948-51, 963, 1014, 1016, 1085-86, 1097, 1171, 1183-84.

<sup>237</sup> See IMPEACHMENT, SELECTED MATERIALS ON PROCEDURE, *supra* note 45, at 243-341, 789-93.

<sup>238</sup> Cf. *supra* text accompanying notes 170-73 (arguments for presumptively applicable rules to govern House impeachment inquiry).

<sup>239</sup> See Goldstein, *Memorandum IV on Rules of Evidence for Senate Impeachment Trials*, in IMPEACHMENT: MISCELLANEOUS DOCUMENTS, *supra* note 141, at 239; Firmage & Mangrum, *supra* note 167, at 1059-61, 1062-78; Futterman, *supra* note 21, at 112-18.

<sup>240</sup> See FED. R. EVID. 401-402.

<sup>241</sup> See, e.g., Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786 (1979-80).

<sup>242</sup> Cf. Goldstein, *supra* note 239, at 255-81; *id.* at 276 (concluding that “there are good reasons for not holding the Senate strictly to judicial hearsay rules”).



is for purposes of rejecting a claim under the sixth amendment,<sup>243</sup> although it would usually be sufficient. Similarly, the fact that such an exception could not be found would not always require exclusion if, evaluated discretely, the evidence were deemed highly trustworthy and there was need for it because of the unavailability of other comparably probative evidence.

Finally, if the Senate does revise its rules for impeachment trials, it should avoid the temptation of other transplants besides the Federal Rules of Evidence, in particular the Federal Rules of Civil Procedure. One of the reasons, although not the primary reason, the Senate's 1974 effort yielded such meager changes in the rules was that the only concrete proposal the Committee on Rules considered was hopelessly misdirected. That proposal, put forward by Senator Mansfield,<sup>244</sup> attempted to dress an impeachment trial in the clothes of a federal civil action.<sup>245</sup> Those clothes do not fit comfortably.<sup>246</sup> Some borrowing may be appropriate, but it will necessarily be highly selective. For the rest, the clothes must be custom-made, although even custom-made clothes may draw inspiration from those that are mass-produced.

### III. ALTERNATIVES TO CURRENT ARRANGEMENTS: GENERAL CONSIDERATIONS

My primary concerns in this Essay have been to urge that Congress proceed with care and thoroughness in considering whether to initiate the process of changing the arrangements for removing federal judges that are prescribed by the Constitution, that it view those arrangements in the context both of our tripartite system of government and of all of society's defenses against the excesses of life tenure, and that its comparative

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<sup>243</sup> See *Bourjaily v. United States*, 107 S. Ct. 2775, 2782-83 (1987). Professor Goldstein noted possible constraints, analogous to those imposed by the sixth amendment, on complete relaxation of hearsay rules in Senate trials. See Goldstein, *supra* note 239, at 280-81.

<sup>244</sup> See *Senate Rules*, *supra* note 21, at 171-234.

<sup>245</sup> See, e.g., *id.* at 223-25 (Rule 5-Pleadings); *id.* at 225-26 (Rule 6-Conference and Trial Order); *id.* at 226-27 (Rule 7-Discovery). Senator Mansfield also borrowed from the Federal Rules of Criminal Procedure, but less extensively. See *id.* at 173, 202, 213.

<sup>246</sup> See, e.g., *id.* at 29 (Sen. Thurmond criticizes proposal regarding discovery); *id.* at 83 (Sen. Helms suggests that proposal regarding amendment of articles is unconstitutional); *id.* at 200 (Sen. Stennis agrees with Sen. Helms).



assessment include the costs and the benefits of current arrangements as they might be adjusted with fidelity to the Constitution. This is not the place for a detailed analysis of alternatives to current arrangements that might be implemented by constitutional amendment. A few general observations may, however, be helpful.

The more ambitious of the proposed constitutional amendments introduced during or after the Claiborne affair differ in a number of respects, but they share one fatal defect. They would empower Congress to prescribe by legislation either the process leading to removal or the substantive standard for removal or both. Such open-ended proposals constitute “an invitation to domination of one branch of government by another that should be no more acceptable today than it was to the framers 200 years ago.”<sup>247</sup>

One of the constitutional amendments proposed in response to recent developments provides:

The Congress shall have the power by appropriate legislation to set standards and guidelines by which the Supreme Court may discipline judges appointed pursuant to Article III who bring disrepute on the Federal courts or the administration of justice by the courts. Such discipline may include removal from office and diminution of compensation.<sup>248</sup>

Another of the proposed constitutional amendments would empower Congress “to provide procedures for the removal from office of Federal judges serving pursuant to Article III of the Constitution, found to have committed treason, bribery, or other high crimes and misdemeanors.”<sup>249</sup>

Assuming that these proposals should be taken at face value (not as mere vehicles for developing specifics to be embodied in revised proposals),<sup>250</sup> they are objectionable without reference to specifics their sponsors may have had in mind. As to the first of them,

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<sup>247</sup> Burbank, *Politics and Progress*, *supra* note 62, at 22.

<sup>248</sup> S.J. Res. 370, 99th Cong., 2d Sess. (1986) (introduced by Sen. DeConcini).

<sup>249</sup> S.J. Res. 113, 100th Cong., 1st Sess. (1987) (introduced by Sen. Heflin for himself, Sen. Shelby, Sen. Stevens, and Sen. Sanford).

<sup>250</sup> See *supra* text following note 67; *infra* note 252.

we would be foolish to give Congress a blank check "to set standards and guidelines" for the discipline (including the removal) of federal judges. . . . It is no answer that . . . the Supreme Court would be the instrument of Congress for these purposes. For, passing the burdens under which the Court presently labors, it would be bound by the constitutional amendment and implementing legislation and would have only as much leeway to "maintain the independence of the judicial branch" as the legislation afforded.

Nor is it a comfort that the legislation would be cabined by a constitutional standard of bringing "disrepute on the Federal courts or the administration of justice by the courts." The capacity of the standard to lead to mischief is well documented in the debates and deliberations that preceded the passage of the 1980 Act. Finally, even if we were willing to trust future Congresses to adhere to a principle of generality in enacting implementing legislation, we should be concerned about another danger: the threat that open-ended disciplinary standards and procedures pose to the independence of individual federal judges.<sup>251</sup>

The second proposal at least would perpetuate the current constitutional standard, but it is otherwise open-ended and for that reason unacceptable.<sup>252</sup>

Assuming that any proposed constitutional amendment meriting serious consideration would be sufficiently specific as to both process and substantive standards to permit informed judgment on its likely costs and benefits, how should Congress assess proposed alternatives?

First, Congress should avoid re-inventing the wheel. The legislative history of the 1980 Act, which for present purposes is a history of more than a decade of hearings and reports, includes substantial information about other systems of judicial discipline, in particular those used in the states.<sup>253</sup> Although the

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<sup>251</sup> Burbank, *Politics and Progress*, *supra* note 62, at 22 (footnotes omitted).

<sup>252</sup> In fact, it appears that Sen. Heflin has a particular alternative in mind. See Heflin, *The Impeachment Process*, *supra* note 208, at 125 ("I am currently in the process of drawing up legislation to implement my proposed constitutional amendment. This legislation would create a Judicial Inquiry Commission and a Court of the Judiciary.").

<sup>253</sup> See H.R. REP. NO. 1313, *supra* note 38, at 2-5; Burbank, *supra* note 7, at 291-300.

published literature evaluating the operations of state systems in recent years is not very illuminating for this purpose,<sup>254</sup> that literature, together with other available data, may prove helpful in testing Senator Heflin's recent claims as to the effectiveness of state systems and their adaptability to the federal system.<sup>255</sup>

Second, if Congress concludes that change is necessary in the current arrangements for removing federal judges, it should consider whether the new arrangements should be confined to that situation, as Senator Heflin's proposal, although not his explanation of it,<sup>256</sup> suggests. The question necessarily implicates the effectiveness of the 1980 Act in resolving problems that do not warrant removal, a question, that, if Congress follows the course recommended here, will already have been addressed.<sup>257</sup> I pose it because of two concerns. One is that a monolithic system of judicial discipline for the most trivial as well as the most serious offenses seems likely to be shaped with the latter in mind.<sup>258</sup> Alerted to the costs of trans-substantive procedure in other contexts,<sup>259</sup> we should not quickly impose it on the substantive law of judicial discipline. Put another way, we should not use a "hundred-ton gun"<sup>260</sup> to kill a gnat. The second, and a related concern, is that the more adversarial any new (trans-substantive) arrangements are, the more likely is the new system

<sup>254</sup> See, e.g., Moser, *Populism, a Wisconsin Heritage: Its Effect on Judicial Accountability in the State*, 66 MARQ. L. REV. 1 (1982-83); Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811 (1987-88); Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 PACE L. REV. 291 (1987); Wicker, *Are Judges Receiving Due Process in Disciplinary Proceedings?*, 22 JUDGES J. 35 (Spring 1983); Comment, *Judicial Misconduct in California*, 11 SAN. FERN. V.L. REV. 43 (1983-84).

<sup>255</sup> See Heflin, *In Wake of Claiborne Trial*, *supra* note 208; Heflin, *The Impeachment Process*, *supra* note 208, at 125. Senator Heflin may be unaware that Congress did "examine the various ways in which the states remove judges," *id.*, prior to passing the 1980 Act. At least when the issue was use of those models for action short of removal, they were found inappropriate for transplant to the federal system. See, e.g., H.R. REP. No. 1313, *supra* note 38, at 3-5; Burbank, *supra* note 7, at 291-308; see also *infra* note 268.

<sup>256</sup> See Heflin, *In Wake of Claiborne Trial*, *supra* note 208; Heflin, *The Impeachment Process*, *supra* note 208, at 124.

<sup>257</sup> See *supra* text accompanying notes 58-65, 76-101.

<sup>258</sup> Cf. *supra* note 170 (suggesting that House rules for Nixon impeachment inquiry may prove to be a mischievous precedent).

<sup>259</sup> See, e.g., Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1465, 1474-76 (1986-87).

<sup>260</sup> See *supra* text accompanying note 55.

to discourage talented lawyers from aspiring to or remaining on the federal bench.<sup>261</sup> I happen to believe that the 1980 Act was necessary and that its faithful implementation by the federal judiciary is important.<sup>262</sup> But there is a limit to letting the existence of a "few bad apples" dictate health regulations, and given the present state of morale of the federal judiciary, that limit is quickly reached.

Finally, although perhaps the first consideration for Congress, any suggested alternative that is found in another system should be analyzed in *its* context. What is the place of judicial independence in that system, and more generally, what is the place of the judiciary in the structure of government? To put a point on such inquiries, what comfort can those concerned about the federal system take from assurances that a judicial discipline system has not diluted judicial independence in a state whose judges are elected?<sup>263</sup>

### CONCLUSION

Concerns about efficient administration of the law are as pervasive as they are understandable. So, it may be, is the tendency of institutional self-interest to shape conceptions of institutional mission, particularly when, in serving its own interests, an institution can preserve or even augment its power.<sup>264</sup> Constitutional amendment is, however, an expensive way to experiment with alternatives to current arrangements, and neither institutional self-interest nor institutional power is a compelling argument for change when those arrangements are designed to preserve the countervailing power of another institution.

The removal of federal judges is, I have argued, a polycentric problem. Its wise resolution requires an antecedent process of study and deliberation far more ambitious and painstaking than

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<sup>261</sup> Cf. H. REP. NO. 1313, *supra* note 38, at 3-4 (rejecting such arrangements for discipline short of removal); Burbank, *supra* note 7, at 306-07, 325. On the problem of morale, see, e.g., R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 29-47 (1985); Feinberg, *The Coming Deterioration of the Federal Judiciary*, 42 REC. A.B. CITY N.Y. 179 (1987).

<sup>262</sup> See, e.g., Burbank, *Politics and Progress*, *supra* note 62.

<sup>263</sup> See R. WHEELER & A. LEVIN, *supra* note 66, at 14-27, 59-61, 75-76.

<sup>264</sup> See, e.g., Burbank, *The Costs of Complexity*, *supra* note 259.



proposals for this or that alternative are likely to elicit. In addition to advocating such a process in this Essay, I have attempted to suggest an analytical approach, to sketch the contours of relevant inquiries, to put some questions to rest, and to raise others. Much research and analysis remains to be done. There is reason to hope that Congress will ensure that the task is pursued.

“[I]n the wake of the impeachment and removal of”<sup>265</sup> Judge Claiborne, Senator Dole not only requested the Rules Committee to review the Senate rules for impeachment trials and urged the Senate Judiciary Committee “to give proposals for a constitutional amendment early consideration.”<sup>266</sup> He also proposed the creation by statute of a “bipartisan Commission, supported by a National Advisory Committee, to investigate and study the constitutional problems of impeaching an Article III judge, and the advisability of proposing an amendment to the Constitution regarding the possible impeachment of such judges.”<sup>267</sup> In introducing the bill that would establish the commission and advisory group, Senator Dole made clear his view that the matter requires “thorough and expeditious consideration,” as well as his goal that the “ad hoc group” established by the resolution “explore the options of alternative remedies to impeachment and . . . fashion an appropriate amendment to the Constitution.”<sup>268</sup> Although Senator Dole’s proposal has languished in the Senate, it has been picked up and refined by Representative Kastenmeier in a bill recently introduced in the House.<sup>269</sup>

Senator Dole and Representative Kastenmeier have a good idea, although the former may underestimate the time that a commission would require for the work if expedition were not to overwhelm thoroughness.<sup>270</sup> We have waited two hundred

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<sup>265</sup> 132 CONG. REC. S16,788 (daily ed. Oct. 16, 1986).

<sup>266</sup> *Id.* at S16,789.

<sup>267</sup> S. 2934, 99th Cong., 2d Sess. § 2 (1986); 132 CONG. REC. S16,789 (daily ed. Oct. 16, 1986).

<sup>268</sup> 132 CONG. REC., *supra* note 267. Senator Dole is aware of the potential usefulness of the pre-1980 Act legislative record. *See id.*; *supra* note 255.

<sup>269</sup> *See* H.R. 4393, 100th Cong., 2d Sess. §§ 201-10 (1988); Kastenmeier, *supra* note 93, at 793-96.

<sup>270</sup> *See* 132 CONG. REC. *supra* note 267 (anticipating report of Commission “shortly after the next Congress begins its work”). Representative Kastenmeier’s bill is more



years for a change, and, realistically, new arrangements could not be in place in time to deal with the matters that prompt present concerns. Whatever the future holds in the way of federal judges unfit to serve, we must ensure that the arrangements we make for them do not disable the federal judiciary as a whole.

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realistic, calling for a report by the proposed commission “not later than one year after the date of its first meeting.” H.R. 4393, 100th Cong., 2d Sess. § 208 (1988).